Supreme Court, U.S.
FILED
FEB 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E. BARRETT PRETTYMAN, JR.*
MARY ANNE MASON
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4500

PETER C. PAULY
LOBLE & PAULY
833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624
(406) 442-0070

BOYD L. HENDERSON
ALEX T. WYCHE
TENNECO SYNFUELS
Tenneco Building
P.O. Box 2511
Houston, Texas 77001
(713) 757-3078

STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT & KUNZ
Suite 402
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723

* Counsel of Record

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where Congress approves an interstate compact as a means of resolving disputes between States over the division and apportionment of water and of developing water resources for use in interstate commerce, but gives no indication in the compact or in the legislative history that it intends to approve otherwise invalid restrictions on interstate commerce, may the signatory States use the compact to restrict the transfer of water to any other State?

PARTIES TO THE PROCEEDINGS

Plaintiff below, Intake Water Company, a Delaware Corporation, is petitioner before this Court.*

In addition to the Yellowstone River Compact Commission, the following are respondents in this Court: Gary Fritz, George Christopulos, and L. Grady Moore, as members of the Yellowstone River Compact Commission; Mike Greeley, Attorney General of the State of Montana; Vernon Fahy, State Engineer of the State of North Dakota; and the North Dakota State Water Commission.

---

* In accordance with Rule 28.1 of this Court, the affiliates and subsidiaries of petitioner Intake Water are listed at App. 39a-70a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. Congressionally Approved Interstate Compacts Are Not an Exception to Dormant Commerce Clause Restrictions	8
A. The Commerce Clause Restricts Exclusive State Ownership of Resources	8
B. Congressional Approval Did Not Contemplate a Ban on Water Exports	10
II. The Scope and Nature of Congressional Consent to an Interstate Compact	13
A. Congressional Consent Is Not Congressional Law-Making	14
B. Congress Did Not Delegate Congressional Powers Over Interstate Commerce	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

City of Altus v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966) 13
Cuyler v. *Adams*, 449 U.S. 433 (1981) 7, 10, 13, 19
Delaware River Joint Toll Bridge Comm'n v. *Colburn*, 310 U.S. 419 (1940) 13
Geer v. *Connecticut*, 161 U.S. 519 (1896) 8
Green v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823) 16
Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 8, 10
Idaho ex rel. Evans v. *Oregon*, 462 U.S. 1017 (1983) 9, 15
Intake Water Co. v. *Yellowstone River Compact Comm'n*, 590 F. Supp. 293 (D. Mont. 1983), *appeal dismissed*, 105 S. Ct. 316 (1984), *and aff'd*, 769 F.2d 568 (9th Cir. 1985) 1
King v. *Smith*, 392 U.S. 309 (1968) 15
Lake Country Estates v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 15
Montana Department of Natural Resources & Conservation v. *Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976) 5, 10
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 11
New Hampshire v. *Maine*, 426 U.S. 363 (1976) 14
Northeast Bancorp, Inc. v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545 (1985) 17
Petty v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) 13, 14
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) 8, 10
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 11
Rhode Island v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) 19
Rosado v. *Wyman*, 397 U.S. 397 (1970) 15
South-Central Timber Development, Inc. v. *Wunnicke*, 104 S. Ct. 2237 (1984) 7, 11
Sporhase v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) 9, 10, 11

TABLE OF AUTHORITIES—Continued

	Page
Texas v. *New Mexico*, 462 U.S. 554 (1983)	7, 13
Tobin v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962)	18
United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978)	15, 19
Virginia v. *Tennessee*, 148 U.S. 503 (1893)	14, 15, 16
Washington Metropolitan Area Transit Authority v. *One Parcel of Land in Montgomery County*, 706 F.2d 1312 (4th Cir.), *cert. denied*, 464 U.S. 893 (1983)	15, 18
West v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911)	9
Wharton v. *Wise*, 153 U.S. 155 (1894)	19

STATUTES

28 U.S.C. § 1253	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	6
28 U.S.C. § 1331	5
28 U.S.C. § 1332	5
28 U.S.C. § 2281, *repealed prospectively by* Pub. L. No. 94-381, § 1, 90 Stat. 1119 (Aug. 12, 1976)	5
36 Stat. 961 (1911) (codified at 16 U.S.C. § 552 (1982)	16
48 Stat. 909, ch. 406 (1934), 63 Stat. 107 (1949) (codified at 4 U.S.C. § 112 (1982))	16
73 Stat. 333 (1959) (codified at 49 U.S.C. App. § 1743 (1982)	16
Federal Civil Defense Act of 1950, 64 Stat. 1248 (1951) (codified at 50 U.S.C. App. § 2281(g) (1982)	16
Mont. Code Ann. §§ 85-2-801 to 85-2-807 (1983)	4
N.D. Cent. Code § 61-02-14 (1960)	5
Pub. L. No. 231, 65 Stat. 663	*passim*
Wyo. Stat. § 41-12-607(e) (1983)	5

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS Page

H.R. Rep. No. 1118, 82d Cong. 1st Sess. (1951) 3
S. Rep. No. 883, 82d Cong., 1st Sess. (1951) 3, 12, 14, 15
S.J. Res. 88, 67th Cong., 1st Sess., ch. 77 (1921) 15

COMPACTS

Arkansas River Basin Compact, 80 Stat. 1409, 1411-1412 (1966) 7
Kansas-Nebraska Big Blue River Compact, 86 Stat. 193, 197 (1972) 7
Klamath River Basin Compact, 71 Stat. 497, 499 (1957) 7
Pecos River Compact, 63 Stat. 159, 164 (1949) 7
Snake River Compact, 64 Stat. 29, 31 (1950) 7

OTHER AUTHORITIES

Celler, *Congress, Compacts, and Interstate Authorities*, 26 Law & Contemp. Probs. 682 (1961) 16
F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* (1976) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review and reverse its judgment and decision affirming the grant of a motion to dismiss petitioner's complaint.

OPINIONS BELOW

The opinion of the District Court is reported at 590 F. Supp. 293 and appears at App. 7a. At petitioner's request, this Court dismissed an appeal from that decision. 105 S. Ct. 316 (1984); App. 21a. The subsequent decision of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought, dated August 20, 1985, affirming the decision of the District Court, is reported at 769 F.2d 568 and appears at App. 1a.

JURISDICTION

The Court of Appeals' decision in the case at bar was rendered August 20, 1985, affirming the decision of the District Court. A timely petition for rehearing was filed on September 3, 1985, and denied on November 15, 1985. The judgment was entered on August 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause of the Constitution (art. I, § 8, cl. 3) provides in pertinent part:

> The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *.

The Compact Clause of the Constitution (art. I, § 10, cl. 3) provides in pertinent part:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *.

The provisions of the Yellowstone River Compact, including Article X, appear at App. 22a-38a.

STATEMENT OF THE CASE

The Yellowstone River Basin includes four large interstate tributaries in addition to the Yellowstone River itself: the Clarks Fork, the Big Horn River, the Tongue River, and the Powder River. Resource development in the region was long hampered by interstate disputes over water allocation. After nearly 20 years of negotiation, Montana, North Dakota, and Wyoming agreed to the Yellowstone River Compact (the "Compact").

The main provisions of the Compact establish a formula for equitable division of the waters of the Yellow-

stone River's interstate tributaries and an administrative commission to implement the allocation scheme. 65 Stat. 663, art. III, par. V. The formula for allocation of water used for new development on the four interstate tributaries (which rise in Wyoming and flow into Montana) is expressed in terms of percentages as between Wyoming and Montana based on the feasibly irrigable acreages located in those States. *Id.* at art. V. par. B. It is determined on a percentage basis of acreage irrigated as between Montana and North Dakota on the main stem of the Yellowstone River below Intake, Montana. *Id.* at art. V, par. D. Article X of the Compact is superfluous to the allocation formula; it provides that no water may be diverted from the Yellowstone River Basin without the unanimous consent of the three signatories. App. 34a. This latter provision forms the genesis of the present controversy.

The Compact was submitted to Congress for consent, but congressional deliberations were not extensive. The federal representative to the negotiations reported that the Compact would remove obstacles to further development of Yellowstone River resources. S. Rep. No. 883, 82d Cong., 1st Sess. 5 (1951). The Secretary of the Interior recommended the Compact to Congress because, although Yellowstone River Basin resources were important to the regional and national economies, their development had been forestalled by the absence of an agreement to end interstate water allocation disputes. H.R. Rep. No. 1118, 82d Cong., 1st Sess. 5 (1951); S. Rep. No. 883, 82d Cong., 1st Sess. 10 (1951). Congress granted consent to the Compact on October 10, 1951 (Pub. L. No. 231, 65 Stat. 663) (the "Act of Consent") in order to encourage water resource development. H.R. Rep. No. 1118, 82d Cong., 1st Sess. 2, 5; S. Rep. No. 883, 82d Cong., 1st Sess. 4-6, 8, 10. Since the Com-

pact has come into force, no water has been diverted for uses outside the Yellowstone River Basin.

Petitioner Intake Water Company ("Intake") is a Delaware corporation regularly doing business in the State of Montana. On June 8, 1973, Intake appropriated 80,650 acre-feet of the waters of the Yellowstone River in accordance with Montana law. Intake proposed to divert the appropriated waters for use in interstate commerce. The diverted Yellowstone River water would be made available for sale, rent, and distribution to agricultural, municipal, and industrial water users within and outside the Yellowstone River Basin in Montana and North Dakota.

To effect its plan, Intake began on November 9, 1977, to seek the unanimous consent apparently required by Article X of the Compact to an out-of-basin diversion. Simultaneous petitions were filed with the Yellowstone River Compact Commission (the "Commission") and the North Dakota State Water Commission for approval of a diversion of 30,000 acre-feet of water from the Yellowstone River Basin to the Little Missouri River Basin. The Commission ruled that it was without jurisdiction to consent on behalf of the signatory States because only the state legislatures could grant Article X consent. Minutes of Commission meeting, Nov. 9, 1978. Thus, Intake's proposed diversion must be approved by the state legislatures of Montana [1] and Wyoming.[2] The North Dakota

---

[1] In 1981, Intake unsuccessfully sought consent from the Montana legislature to a proposed partial diversion from Intake's appropriation for use outside the Yellowstone River Basin. The legislature rejected Intake's proposal and enacted a statute delegating authority to a state agency to consent to out-of-basin diversions but requiring legislative approval for the first such diversion. Mont. Code Ann. §§ 85-2-801 to 85-2-807 (1983). Intake's project would be the first out-of-basin diversion.

[2] A Wyoming statute delegates authority to the State Engineer to consent to out-of-basin diversions but requires that legislative

state legislature has delegated authority to its State Water Commission to consent to out-of-basin diversions. N.D. Cent. Code § 61-02-14 (1960).

Intake filed its Complaint in the instant action in the United States District Court for the District of Montana on June 29, 1973. The proceedings were stayed by order of the District Court pending the outcome of litigation challenging the validity of Intake's water appropriation. The Supreme Court of Montana upheld Intake's appropriation in *Montana Department of Natural Resources & Conservation* v. *Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976). The federal stay was dissolved by order of the District Court on October 17, 1980, and Intake filed an Amended Complaint for Declaratory Judgment and Application for Injunctive Relief. In December 1981, following its unsuccessful efforts to win consent from the Montana state legislature, Intake filed a Second Amended Complaint seeking declaratory and injunctive relief. The defendants filed a Motion to Dismiss in response to Intake's First and Second Amended Complaints. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1332, and art. III, par. G of the Compact.

The three-judge District Court [3] ruled that the Compact is a federal law to which Commerce Clause objections do not pertain. The court concluded that "[w]hen Congress approved the Compact, Congress was acting within its

---

approval be obtained for any interstate use of diverted waters. Wyo. Stat. § 41-12-607(e) (1983).

[3] At the time this case was filed, a three-judge District Court was required for any suit in which a party sought to enjoin enforcement of a state statute on federal constitutional grounds. *See* 28 U.S.C. § 2281, *repealed prospectively by* Pub. L. No. 94-381, § 1, 90 Stat. 1119 (Aug. 12, 1976). Petitioner's complaint challenged the constitutionality of a state statute on several grounds, thereby requiring that a three-judge court be convened to decide the issue.

authority to immunize state law from Commerce Clause objections by converting it to federal law." App. 12a.[4] Petitioner's request for declaratory and injunctive relief was denied.

Petitioner appealed only from the three-judge District Court's denial of declaratory relief. App. 19a-20a. Because of uncertainty as to whether such an appeal properly lay directly with this Court under 28 U.S.C. § 1253 or with the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291, petitioner noted an appeal to both courts. In its jurisdictional statement filed with this Court, petitioner took the position that the appeal properly lay in the Court of Appeals and asked that the appeal in this Court be dismissed. The Solicitor General agreed. This Court dismissed the appeal for want of jurisdiction on October 29, 1984. App. 21a.

With jurisdiction established in the Court of Appeals, the Ninth Circuit reviewed the merits, affirmed the District Court's ruling, and adopting its reasoning. App. 1a-5a. In a concurring opinion, District Judge Tashima noted that the decision applies a "*per se* rule that when Congress approves a compact, it *ipso facto* converts the provisions of the compact into federal law sufficient to immunize the compact from Commerce Clause attack." App. 6a. He further acknowledged that neither the District Court nor the Ninth Circuit had addressed the issue urged by petitioner—whether congressional consent to a compact "operate[s] as a kind of blanket approval for state actions under a compact which otherwise would violate Commerce Clause restrictions." App. 5a & n.1.

---

[4] The District Court also dismissed elements of petitioner's complaint alleging violation of the Equal Protection Clause of the Constitution and misinterpretation of the terms of the Compact. These claims were not pursued in the Court of Appeals, nor are they presented here.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has seriously misconstrued several of this Court's recent decisions, principally *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981), and *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983). It has read these decisions to mean that whenever Congress approves an interstate compact, it necessarily thereby allows the signatory States to impose any restrictions they may wish on interstate commerce, even though Congress never contemplated any such result. The ruling thus creates a broad exception—never approved by this Court—to the hitherto universally recognized rule that congressional intent in regard to state restrictions on interstate commerce must be "unmistakably clear." [5]

The decision effectively subordinates federal commerce interests in all cases involving a congressionally approved interstate compact regardless of congressional intent in regard to state restrictions on interstate commerce. This anomaly will have far-reaching consequences for a wide array of federal interstate commerce interests currently the subject of interstate compacts.[6] The instant case il-

---

[5] *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984).

[6] Many important areas of commerce are the subject of interstate compacts including air and water pollution, acid rain, nuclear waste management, river and harbor control, and natural resource management. The most immediate impact of the challenged precedent is in the area of interstate water compacts. A number of water compacts contain potentially damaging restrictions on out-of-basin or out-of-state use of the subject waters. *See, e.g.*, Klamath River Basin Compact, 71 Stat. 497, 499, art. III(B) (1957) (exportation of water essentially prohibited); Snake River Compact, 64 Stat. 29, 31, art. IV (1950) (single-state veto of out-of-basin use); Kansas-Nebraska Big Blue River Compact, 86 Stat. 193, 197, art. V, § 5.4 (1972) (single-state veto of out-of-basin use); Pecos River Compact, 63 Stat. 159, 164 art. VII (1949) (importing State has exclusive use of water); Arkansas River Basin Compact, 80 Stat. 1409, 1411-12, art. VIII (1966) (importing State has exclusive use of water).

lustrates an immediate and widespread collision of federal and state interests in interstate water resources arising from the Court of Appeals' decision. To protect federal commerce interests ignored below, and to reconcile a clear conflict between Commerce Clause and Compact Clause precedents, the writ of certiorari should be granted and the Court of Appeals' decision reversed.

I. Congressionally Approved Interstate Compacts Are Not an Exception to Dormant Commerce Clause Restrictions.

The Ninth Circuit's conclusion that the signatory States now enjoy Commerce Clause immunity is at odds with important developments in the law since the Compact was approved thirty-five years ago. State ownership and control of natural resources located within their borders now is clearly subject to Commerce Clause restrictions on state regulation of interstate commerce, and Congress must affirmatively, in "unmistakably clear" terms, authorize state regulation—otherwise, state restrictions on interstate commerce in natural resources are prohibited.

A. The Commerce Clause Restricts Exclusive State Ownership of Resources.

In 1979 this Court firmly rejected the notion that States own the resources within their borders and therefore may restrict interstate access to them at will. *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979) ("A State may no longer 'keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose' ") (quoting *Geer* v. *Connecticut*, 161 U.S. 519, 530 (1896)). In the space of a few years this Court ruled that a host of natural resources located within state borders were articles of interstate commerce that States could not withhold from the national stream of commerce.[7]

---

[7] *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. at 326-335 (state regulation of wildlife must conform to the Commerce Clause); *Philadelphia*

Idaho ex rel. Evans v. *Oregon*, *supra*, perfectly reflects the changed view of state authority over natural resources: state actions that preserve exclusive access to a natural resource are presumptively wrong, even if congressional consent has been obtained to an interstate agreement. 462 U.S. at 1021-25. Oregon and Washington entered into an interstate agreement to regulate anadromous fish in the Columbia River. Several times Idaho sought entry to the Oregon-Washington Columbia River Fish Compact but was rebuffed. *Id.* at 1021-22. Idaho alleged in this Court that Oregon and Washington were causing the number of fish that reached Idaho's waters to be reduced. Idaho was unable to prove actual injury (and therefore was not entitled to a remedy), but this Court nevertheless ruled that Idaho had an enforceable, equitable right to a share of the anadromous fish covered by the Oregon-Washington Columbia River Fish Compact *Id.* at 1025-26. In so holding, the Court reasoned that Idaho's right to an equitable apportionment arises from the principles urged here by petitioner:

> At the root of the [equitable apportionment] doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders. [*Id.*]

Oregon and Washington also had obtained congressional consent to their interstate compact. *Id.* at 1021-22. But in that case this Court did not even suggest that con-

---

v. *New Jersey*, 437 U.S. 617, 625-628 (1978) (interstate access to solid waste disposal capacity in New Jersey may not be prohibited in order to preserve that State's environmental resources); *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1025 (1983) (States not party to an anadromous fish compact have an equitable right to the resources in keeping with Commerce Clause principles); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 951, 956 (1982) (water is an article of interstate commerce, and Nebraska may not ban its export from the State except in times of shortage); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (Oklahoma may not prohibit the interstate transfer of natural gas).

gressional approval was sufficient to save actions in conflict with the Commerce Clause. The policy and reasoning of that case are directly pertinent here and should supercede the Compact Clause analysis adopted by the Court of Appeals from *Cuyler* v. *Adams*.

In short, the assumption underlying Article X—that the signatory States have an ownership right to exclude others from Yellowstone River water—has been rejected by this Court. Individually, Montana, North Dakota, and Wyoming may not prohibit the export of water from their territory without violating the Commerce Clause. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. at 951, 956. A ban on exports that "overtly blocks the flow of interstate commerce at [the] State's borders" is invalid virtually *per se*. *Philadelphia* v. *New Jersey*, 437 U.S. at 624; *Hughes* v. *Oklahoma*, 441 U.S. at 337. The signatory States' legitimate health and safety interests unquestionably permit measures short of an absolute ban to protect local interests. *Hughes* v. *Oklahoma*, 441 U.S. at 337; *Sporhase*, 458 U.S. at 957-958. But only "[a] demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water." *Id.* at 958. None of the signatory States has profferred such a justification for the continuing ban on exports.[8] They simply rely on Article X of the Compact to withhold their water resources indefinitely from interstate commerce.

B. Congressional Approval Did Not Contemplate a Ban on Water Exports.

Article X currently erects a barrier to interstate commerce that is constitutionally impermissible unless it is

---

[8] To the contrary, there have been surpluses of water in the Yellowstone River system since this case was filed. *See Montana Department of Natural Resources & Conservation* v. *Intake Water Co.*, 171 Mont. at 437, 558 P.2d at 1121.

approved by Congress. But this Court has ruled repeatedly that such congressional approval must be explicit; it may not be inferred. *E.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946); *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. at 2242.[9] Here, the Court of Appeals concluded, despite evidence of contrary congressional intent, that consent to the Compact *ipso facto* provided authorization for the signatory States to impose an otherwise unconstitutional ban on the export of water from the Yellowstone River Basin.

Judge Tashima's concurring opinion states that:

> The real issue raised by appellant is what inference should be drawn from an essentially silent congressional record, which is the case here. Neither the Act of Consent to the Yellowstone River Compact, * * * nor its legislative history, discloses that Commerce Clause immunity was expressly considered. [App. 6a; citation omitted.]

In other words, the Court of Appeals majority never evaluated whether the legislative history's silence on the question of immunity was in harmony with this Court's Commerce Clause precedents.

While the legislative history is silent on the precise question of Commerce Clause immunity, it is not devoid of reference to interstate commerce concerns. If any-

---

[9] In *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. at 960, the Court pointed out that interstate water compacts do not prove congressional intent to remove federal constitutional restraints on state water law. State laws remain subject to the Commerce Clause, and congressional willingness to let States settle water-rights disputes is not persuasive evidence of consent to unreasonable burdens on commerce. And in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (quoting *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. at 427, 431), the Court said that when Congress has not "expressly stated its intent and policy" to sustain legislation from Commerce Clause attack, the courts have no authority to rewrite legislation based on speculation as to what Congress "probably had in mind."

thing, the legislative history shows that the Compact was represented to Congress as a means to resolve local disputes that would be a stepping stone to development of Yellowstone River water resources for use in interstate commerce.

• The Compact's preamble describes its purposes: "to provide for an equitable division and apportionment of such [Yellowstone River] waters, and to encourage the beneficial development and use thereof * * *." App. 22a.

• The Secretary of the Interior urged congressional approval of the Compact because it would clear the way for development of the river's resources to the benefit of the national economy. S. Rep. No. 833, 82d Cong., 1st Sess. 10.

• The Compact was expected to achieve an end to interstate bickering. *Id.* Thus, the federal representative to the Compact negotiations reported that "[o]bstacles to the continued orderly development of resources would be removed." *Id.* at 8.

• Congress must have concluded from the way the Compact was described that there would be no adverse impacts on interstate commerce. For example, Congress was told that the Compact Commission would "affect only Montana and Wyoming operations" because its mission was limited to carrying out the Compact's water allocation scheme in conformity with Articles V to X. *Id.* at 3.[10]

Congress plainly hoped by approving the Compact to encourage interstate commerce, not to shackle it with state prohibitions on interstate use of Yellowstone River

---

[10] This cryptic reference in the legislative history suggests that Article X may have been perceived by Congress only as a means to enforce the Compact's water allocation scheme as between Montana and Wyoming. In any case, it was never stated, expressly or implicitly, that Article X would serve as a tool for the signatory States to exclude Yellowstone River water from interstate commerce.

water.[11] But the Court of Appeals disregarded apparent congressional intent and this Court's unequivocal requirement that Congress must affirmatively, unmistakably express intent to relinquish to States the regulation of interstate commerce. Unless this Court reverses, lower courts guided by the Ninth Circuit could widen this newly-created "interstate compact" exception to the dormant Commerce Clause. They may wrongly assume that Congress approves state restrictions on interstate commerce *sub silentio* whenever it consents to an interstate compact. The instant case thus presents the first opportunity for this Court to provide guidance on the unexplored—and increasingly significant—linkage between the congressional commerce power and the constitutional requirement that Congress approve certain interstate agreements.

II. The Scope and Nature of Congressional Consent to an Interstate Compact.

This Court has many times considered the effect of congressional intent to an interstate compact from the standpoint of federal question jurisdiction. *Cuyler* v. *Adams*, *supra*, settled the controversy: "an interstate compact approved by Congress * * * is thus a federal law subject to federal rather than state construction." 499 U.S. at 438.[12] The question here presented is the constitu-

---

[11] Forcing Intake to seek permission from state *legislatures* is in and of itself an impermissible burden, over and above the refusal to allow out-of-state diversions. *See City of Altus* v. *Carr*, 255 F. Supp. 828, 833-834 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966) (per curiam).

[12] *See also Texas* v. *New Mexico*, 462 U.S. at 564 (once congressional consent is granted, a compact is subject to interpretation as a federal law, and, "[o]ne consequence of this metamorphosis is that unless the compact * * * is somehow unconstitutional, no court may order relief inconsistent with its express terms"); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 427 (1940) (construction of an interstate compact sanctioned by Congress is a federal question reviewable on certiorari in this Court); *Petty* v.

tional significance of congressional consent to a compact. Does Congress do more when it consents to a compact than permit States to enter an agreement that the Compact Clause prohibits them from joining? [13] If so, does the compact become a substantive federal law, and should the signatory States thereafter enjoy blanket approval of actions which violate Commerce Clause restrictions?

The Court of Appeals assumed that as a substantive law of the United States the Compact was an express grant to the signatory States of federal powers over interstate commerce. This conclusion holds grave implications for congressional legislative powers and for federal commerce powers.

A. Congressional Consent Is Not Congressional Law-Making.

Until the instant case, the naked act of congressional consent to a compact had never been deemed by any court to effect automatic conversion of the compact into a federal law for all purposes.[14] Nor has any other court

---

Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278 (1959) (meaning of interstate compact is question of federal law because it involves an agreement among several States).

[13] It is well settled that congressional consent operates as a determination that the compact in question does not encroach upon or interfere with the just supremacy of the United States under the Compact Clause of the Constitution. *New Hampshire* v. *Maine*, 426 U.S. 363 (1976); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893) (the Compact Clause is limited to agreements "directed to the formation of any combination tending to the increase of political power in the States").

[14] The legislative history casts doubt on the notion that Congress made the Compact a federal law. In his report to Congress the Secretary of the Interior raised three specific objections to the provisions of the Compact. Each of them, he said, "should properly be dealt with in Federal legislation rather than in a compact * * *." S. Rep. No. 833, 82d Cong., 1st Sess. 12 (1951). Similarly, the Acting Director of the Bureau of the Budget argued that changes in several provisions of the Compact were desirable to protect

ruled that state actions pursuant to a congressionally-approved interstate compact are immunized from challenge under the Commerce Clause. *Cf. Idaho ex rel. Evans* v. *Oregon*, 462 U.S. at 1025-26; *Washington Metropolitan Area Transit Authority* v. *One Parcel of Land in Montgomery County*, 706 F.2d 1312, 1319 (4th Cir.), *cert. denied*, 464 U.S. 893 (1983).[15] To the contrary, congressional consent may not even involve an exercise of the congressional power to make laws.

Some, but not all, agreements among States require the consent of Congress,[16] and consent may be granted in a variety of ways. Congress may pass an act of consent, as it did in the instant case. Alternatively, Congress may

---

federal interests but acknowledged that Congress was powerless to legislate changes to the Compact since it had been ratified by the signatory States. *Id.* at 9.

[15] The question whether state action taken under an interstate compact approved by Congress is immunized from constitutional challenges has yet to be resolved directly. This Court indirectly addressed the issue in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 399 n.13 (1979):

> The fact that the Compact at issue here required congressional consent to be effective clearly does not itself mean that action taken pursuant to it does not qualify as being "under color of state law." This Court has, in the past, accepted that state regulations are properly considered "state law" even though they required federal approval prior to their implementation. *See Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).

[16] The Compact Clause requires consent only if the compact alters the political balance of power between the States and the federal government. *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978); *Virginia* v. *Tennessee*, *supra*. Indeed, many compacts submitted to Congress for approval may not actually have required congressional consent. As this Court has noted, "[i]t is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling." *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. at 471.

pass a joint resolution.[17] Or, it may enact legislation providing consent-in-advance to an interstate compact covering specified matters.[18] Consent also can be granted if Congress fails to object to the terms of a compact.[19] And, consent may be implied if Congress takes subsequent action consistent with the terms of a compact.[20] Moreover, the form of congressional consent to a compact bears no apparent relationship either to its content or to the extent to which it presents potential conflicts with federal powers.[21]

This Court long has recognized that there is no constitutionally required form for congressional consent. *Green* v. *Biddle*, *supra*. Consent may be granted in advance or by implication. Consent may be found even where the compact in question, unlike a federal statute, has not been enacted by both Houses of Congress and

---

[17] *See, e.g.*, Joint Resolution Granting Consent of Congress to An Agreement Creating the Port of New York and Establishing the Port of New York Authority. S.J. Res. 88, 67th Cong., 1st Sess., ch. 77 (1921).

[18] *E.g.*, 36 Stat. 961 (1911) (codified at 16 U.S.C. § 552 (1982)) (forests and water supply); 48 Stat. 909, ch. 406 (1934), 63 Stat. 107 (1949) (codified at 4 U.S.C. § 112 (1982)) (crime control); 73 Stat. 333 (1959) (codified at 49 U.S.C. App. § 1743 (1982)) (airport development).

[19] *E.g.*, Federal Civil Defense Act of 1950, 64 Stat. 1248 (1951) (codified at 50 U.S.C. App. § 2281(g) (1982)) (consent deemed granted if Congress fails to enact a concurrent resolution of disapproval within 60 days).

[20] *E.g.*, *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 85-87 (1823) (any affirmative subsequent act recognizing the compact can imply consent); *Virginia* v. *Tennessee*, 148 U.S. at 521-522 (admission of Tennessee as a State conferred consent on prior Tennessee-Virginia boundary agreement).

[21] For a general discussion of the methods by which Congress consents to interstate compacts, *see* Celler, *Congress, Compacts, and Interstate Authorities*, 26 Law & Contemp. Probs. 682, 686-690 (1961); F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* (1976).

signed into law by the President. Simply stated, consent may be granted without an exercise of the congressional legislative power.

Here, Congress merely consented to the substance of an agreement negotiated and ratified by the States. Unable to change the terms of the agreement, Congress reserved its right later to alter, amend or repeal its consent. Act of Consent, 65 Stat. 663, § 2. When Congress included this reservation, it underscored the fact that the Compact was something other than a federal statute: Congress always retains the right to alter, amend, or repeal a federal enactment, and need not say so.[22]

Under these circumstances, the Court must consider how congressional consent can be deemed to operate a transformation from state law to federal law. More specifically, the Court must determine whether a state-generated compact, never subjected to the normal congressional legislative process, can enjoy an express congressional grant of jealously-guarded federal powers over interstate commerce.

B. Congress Did Not Delegate Congressional Powers Over Interstate Commerce.

The Court of Appeals concluded that the signatory States may continue to withhold Yellowstone River water because "'[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.'" App. 5a; quoting *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545, 2554 (1985). The key words, however, are "which it plainly authorizes." There has been no such plain authorization here. Thus, the ramifications of the ruling below are immense. It means that even though Congress approved the Compact with one purpose in mind (encouraging de-

[22] It is axiomatic that if Congress wished to make the Compact a federal law, it could have said so in the Act of Consent.

velopment of Yellowstone River water resources), the States are now free to make use of the Compact for a conflicting purpose (hoarding the water for in-state use in disregard of the needs and demands of interstate commerce).

In effect, the decision determines that Congress has delegated to the signatory States all powers over interstate commerce that can possibly be read into the Compact. This result threatens an erosion of Congress' plenary powers over interstate commerce, and it is inconsistent with precedents from other Circuits. For example, the District of Columbia Circuit assumes that even after congressional consent, Congress remains able "to supervise and regulate the activities of operational compacts in such a way as to insure that no violence is done by [them] to more compelling federal concerns." *Tobin* v. *United States*, 306 F.2d 270, 273 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962). And the Fourth Circuit has concluded that "no prior case goes so far as to hold that consent may constitute delegation of federal power to the authority created by the compact." *Washington Metropolitan Area Transit Authority* v. *One Parcel of Land in Montgomery County*, 706 F.2d at 1319.

The issue petitioner brings to this Court strikes at the heart of two great federal powers—the federal commerce power and the federal compact power. The instant case is not isolated. Many vital areas of interstate commerce are the subject of congressionally approved interstate compacts. *See* note 6, *supra*. Unless their status is clarified, interstate compacts could become a pathway for States to arrogate to themselves, without congressional approval, federal commerce powers.

We will argue, if certiorari is granted, that congressionally approved interstate compacts enjoy no special dispensation from Commerce Clause scrutiny. State regulation of resources pursuant to them must be unmistakably authorized by Congress. Congressional approval of

an interstate compact under the Compact Clause means only that Congress has determined that the compact does not encroach on federal powers or unfairly treat interests of non-participating States. *See United States Steel* v. *Multistate Tax Comm'n, supra*; *Wharton* v. *Wise*, 153 U.S. 155, 169-170 (1894); *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 725-726 (1838). *Cuyler* v. *Adams* has been stretched and misinterpreted to support results unrelated to the Compact Clause concerns it addresses.[23] It now drives a wedge between the federal interests protected by the Commerce Clause and those protected by the Compact Clause.

It is sufficient for present purposes, however, to point out the dichotomy that has emerged between Commerce Clause and Compact Clause precedents in the wake of *Cuyler* v. *Adams*. The lower courts have been led to conclude erroneously that interstate compacts automatically become substantive federal law for all purposes. This Court's intervention is necessary to prevent present peril to important federal commerce interests.

---

[23] *See* notes 12 & 13, *supra*, and accompanying text.

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
MARY ANNE MASON
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4500

PETER C. PAULY
LOBLE & PAULY
833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624
(406) 442-0070

BOYD L. HENDERSON
ALEX T. WYCHE
TENNECO SYNFUELS
Tenneco Building
P.O. Box 2511
Houston, Texas 77001
(713) 757-3078

STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT & KUNZ
Suite 402
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723

Counsel for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3895

D.C. No. CV 1184

INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff-Appellant,

v.

YELLOW RIVER COMPACT COMMISSION; GARY FRITZ; GEORGE CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of the State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,

Defendants-Appellees.

Argued and Submitted
February 8, 1985—Seattle, Washington

Filed August 20, 1985

Before: J. Blaine Anderson and Thomas Tang, Circuit Judges, and A. Wallace Tashima,* District Judge

Opinion by Judge Anderson;
Concurrence by Judge Tashima

Appeal from the United States District Court
for the District of Montana
Alfred T. Goodwin, Circuit Judge, James F. Battin, and Paul G. Hatfield, District Judges, Presiding

---

* The Honorable A. Wallace Tashima, United States District Judge, District of Central California, sitting by designation.

COUNSEL

Loble & Pauly, P.C. and Peter C. Pauly, Helena, Montana; Hogan & Hartson, E. Barrett Prettyman, Jr. and Mary Anne Mason, Washington, D.C.; Hathaway, Speight & Kunz and Stanley K. Hathaway, Cheyenne, Wyoming; Boyd L. Henderson and Alex T. Wyche, Houston, Texas, for the plaintiff-appellant.

Lawrence J. Wolfe, Assistant Attorney General, Cheyenne, Wyoming; Joseph J. Cichy, Bismarck, North Dakota; Blake Watson and Jacques B. Gelin, Department of Justice, Washington, D.C.; Donald D. MacIntyre and Tim D. Hall, Helena, Montana, for the defendants-appellees.

Hanes, Gage & Burke and Jack Gage, Cheyenne, Wyoming, for the amicus curiae Wyoming Heritage Society.

OPINION

ANDERSON, Circuit Judge:

Intake Water Company, a Delaware corporation, appeals a three-judge district court's grant of the Yellowstone River Compact Commission's motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6). We have jurisdiction, 28 U.S.C. § 1291,[1] and affirm.

I. BACKGROUND

The Yellowstone River Compact fixes the water usage of all waters of the Yellowstone River Basin. It was

---

[1] The explicit language of 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court "from an order granting or denying . . . an interlocutory or permanent injunction . . ." and no such issue is presented here. Intake appeals only from that portion of the judgment denying its request for declaratory relief and expressly disclaims appeal from the district court's denial of injunctive relief. We also note that the Supreme Court dismissed appellant Intake's direct appeal for lack of jurisdiction. *Intake Water Co. v. Yellowstone River Compact Commission*, —— U.S. ——, 105 S.Ct. 316 (1984).

enacted by Congress on October 10, 1951. Act of Consent to the Yellowstone River Compact, 65 Stat. 663, Ch. 629, Pub. L. 231 (1951). The signatory states, Montana, Wyoming and North Dakota, approved the Compact and codified it in their laws prior to congressional ratification. Mont. Code Ann. § 85-20-101 (1983); Wyo. Stat. § 41-12-607(e) (1977); N.D. Cent. Code § 61-23-01 (1960). The Yellowstone River Compact Commission is charged by Congress with implementation of the Compact.

In June, 1973, appellant Intake appropriated 80,650 acre feet per year of Yellowstone River water. Intake planned construction of a diversion works, including a reservoir near Dawson, Montana. Some of the water was to be diverted outside the Yellowstone Basin for use elsewhere in Montana and North Dakota and thus outside the jurisdiction of the Compact.

Intake challenged the validity of Article X of the Compact, contending that it discriminated against, unreasonably impeded and exerted an undue burden on the flow of interstate commerce in violation of the Commerce Clause of the Constitution. Art. I, § 8, cl. 3. Article X of the Compact restricts interbasin or interstate transfer of Yellowstone River waters, providing that:

> No waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states.

II. STANDARD OF REVIEW

A ruling on a motion for failure to state a claim upon which relief can be granted is a ruling on a question of law, freely reviewable by the court of appeals. *Rae v. Union Bank*, 725 F.2d 478, 479 (9th Cir. 1984). A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

III. DISCUSSION

Intake alleges that Article X of the Compact, as state law, places a constitutionally impermissible burden on inter-state commerce by requiring unanimous consent of the signatory states for out-of-basin transfers of Yellowstone River water. Appellees, while not challenging the sufficiency of this argument, contend that: the Yellowstone River Compact was approved by Congress; because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack.

The three-judge district court, in a well-reasoned decision, concluded that appellees' argument was the compelling one. *Intake Water Co. v. Yellowstone River Compact Commission*, 590 F. Supp. 293, 296-97 (1983). On the basis of that reasoning, we agree.

When Congress approved this compact, Congress was acting within its authority to immunize state law from some constitutional objections by converting it into federal law. *Cuyler v. Adams*, 449 U.S. 433, 438, 101 S.Ct. 703, 706, 66 L.Ed.2d 641 (1981). *Accord*, *NYSA-ILA Vacation & Holiday Fund v. Waterfront Comm'n. New York Harbor*, 732 F.2d 292 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 175 (1984). Nor can there be any question as to whether Congress in fact approved the state law from which immunity from Commerce Clause attack is claimed: The Compact was before Congress and Congress expressly approved it.

We find additional support for this holding in the Supreme Court's recent decision of *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*, 105 S.Ct. 2545 (1985). There, the Court rejected the argument that regional limitations contained in Massachusetts and Connecticut statutes burdened interstate

commerce. The Court held: "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." 105 S.Ct. at 2554. Thus, as a federal law, the Compact authorizes those actions included within its provisions.

Our review leads us to conclude that Intake failed, as a matter of law, to state any claim for which relief could be granted. The district court did not, therefore, err in granting the motion to dismiss and the portion of the district court's judgment denying declaratory relief is

AFFIRMED.

TASHIMA, District Judge, Concurring:

While I concur in Judge Anderson's opinion, I write separately to set forth an additional reason why I vote to affirm the three-judge district court's denial of declaratory relief.

The primary issue raised by appellant Intake Water Company ("appellant" or "Intake") is best stated in its own words:

> Intake's fundamental contention is that the scope and meaning of congressional consent to an interstate compact will vary from compact to compact . . . The circumstances surrounding the grant of congressional consent to an interstate compact must be examined in each instance on an *ad hoc* basis . . . [A]bsent specific indications to the contrary, congressional consent does not also operate as a kind of blanket approval for state actions under a compact which otherwise would violate Commerce Clause restrictions.

Reply Brief for Appellant at 3 (footnote omitted). The majority opinion does not address this issue.[1] Rather, we

---

[1] Neither, insofar as I can tell, did the district court. *See Intake Water Co. v. Yellowstone River Compact Comm'n*, 590 F. Supp. 293, 296-97 (D. Mont. 1983) (per curiam).

have applied what is, in effect, a *per se* rule that when Congress approves a compact, it *ipso facto* converts the provisions of the compact into federal law sufficient to immunize the compact from Commerce Clause attack.[2] Majority opinion at 4.

I acknowledge that, in so doing, we have considered and rejected Intake's contention that we must examine the circumstances surrounding Congress' action in order to determine whether it *intended* to grant Commerce Clause immunity. While arguing strenuously that its position is supported by the case law, Intake acknowledges that it advances a novel proposition (*i.e.*, that, in terms of the issue it tenders, this is a case of first impression). None of the many cases cited by Intake squarely supports its contention. The real issue raised by appellant is what inference should be drawn from an essentially silent congressional record, which is the case here. Neither the Act of Consent to the Yellowstone River Compact, Pub. L. No. 231, 65 Stat. 663 (1951), nor its legislative history, discloses that Commerce Clause immunity was expressly considered. Appellant contends that such a silent record compels the conclusion that Congress, in approving a compact, intended not to immunize it from Commerce Clause attack.

By rejecting appellant's contention, we merely ascribe to Congress the intent plainly to be inferred from its action, *i.e.*, that it intended to do what it did—approve the Yellowstone River Compact without reservation.[3]

---

[2] We are not here concerned with the hypothetical situation where the statute or its legislative history may be read as affirmatively disclosing an intent to the contrary.

[3] Congress has "expressly reserved" in the Act of Consent the "right to alter, amend or repeal" its consent to the Compact. Pub. L. No. 231 § 2, 65 Stat. 663, 671 (1951). From this, we may infer two things. First, that Congress reserved all that it intended to reserve when it approved the Compact. And, second, that Congress may, at any time, change its mind and withdraw Commerce Clause immunity.

UNITED STATES DISTRICT COURT
D. MONTANA
BILLINGS DIVISION

Civ. No. 1184

INTAKE WATER COMPANY,
Plaintiff.

v.

YELLOW RIVER COMPACT COMMISSION; GARY FRITZ; GEORGE CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of the State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants.

Oct. 25, 1983

Stanley Hathaway, Cheyenne, Wyo., Peter Pauly, Loble & Pauly, Helena, Mont., Boyd Henderson, Associate Gen. Counsel, Tennessee Gas Trans, Houston, Tex., for plaintiff.

Donald MacIntyre, Montana Dept. of Natural Resources and Conservation, Helena, Mont., for defendant Yellowstone River Compact Com'n.

Joseph J. Cichy, Asst. Atty. Gen., Bismarck, N.D., A.E. Bielefeld, Billings, Mont., for defendant Vernon Fahy and North Dakota State Water Com'n.

Tim Hall, Asst. Atty. Gen., Helena, Mont., for defendants Fritz and Greely.

Lawrence J. Wolfe, Asst. Atty. Gen., Cheyenne, Wyo., Vicki W. Dunaway, Billings, Mont., for defendant Christopulos.

William R. Jones and Raymond B. Hunkins, Wheatland, Wyo., for State of Wyoming.

Before GOODWIN, Circuit Judge, BATTIN, Chief District Judge and HATFIELD, District Judge.

MEMORANDUM OF OPINION

This suit for declaratory and injunctive relief is before the Court on a motion to dismiss the four-count second amended complaint. Jurisdiction is conferred by 28 U.S.C. § 1331 and complete diversity under 28 U.S.C. § 1332. When this case was filed on June 23, 1973, a three-judge panel was required by statute for cases such as this one seeking to declare state statutes unconstitutional. 28 U.S.C. § 2281 repealed by Act of August 12, 1976, 90 Stat. 1119. For the reasons discussed below, defendants' motion to dismiss is granted with respect to all Counts.

FACTS

Intake Water Company, a wholly-owned subsidiary of Tenneco, Incorporated, is engaged in purchasing and developing water resources throughout the northwestern United States. Defendant Yellowstone River Compact Commission is charged with implementing a three-state water distribution agreement known as the Yellowstone River Compact. The signatory states are Montana, Wyoming and North Dakota. The Yellowstone River Compact fixes the water usage of all the waters of the Yellowstone River Basin.[1] The Yellowstone River Compact was approved by the legislatures of the three states in early 1951 and by Congress by an Act of October 30, 1951,

[1] The Yellowstone River Basin is the drainage of the Yellowstone River and its tributaries, located mainly in Montana but also including parts of Wyoming and North Dakota.

Public Law 231, 65 Stat. 663. The individual defendants are members of the Yellowstone River Compact Commission (the Commission), the Montana Attorney General and the State Engineer of North Dakota.

In June 1973, Intake Water Company (Intake) appropriated 80,650 acre feet per year (50,000 gallons per minute) of Yellowstone River water pursuant to Montana law. Intake planned to construct a water diversion and reservoir near Dawson, Montana, at a cost of approximately $20 million. Some of the water was to be diverted outside the Yellowstone River Basin for use in Montana and North Dakota and thus outside the jurisdiction of the Yellowstone River Compact. Intake filed this suit in late June 1973 for a determination of the constitutionality of a specific provision of the Yellowstone River Compact (the Compact) and a Montana statute requiring the permission of the Montana Legislature to export Montana water for use out of state.

In 1974, the instant case was stayed pending litigation in state court of a preliminary issue. In late 1976, the Montana Supreme Court affirmed the state district court decision in favor of Intake. No motion was made to dissolve the stay in the instant case until 1980. In that year, this Court issued an order to show cause why the case should not be dismissed for want of prosecution. Intake provided the Court with an affidavit listing the activities of Intake during the period from 1977 to 1980; the Court was satisfied that Intake had pursued the interests intended to be protected by this lawsuit during the period from 1977 to 1980 and allowed the case to continue.[2] In-

---

[2] After resolution of the state suit in late 1976, Intake applied to the Commission for permission to divert the sought-after waters with the expectation that if the request were granted the instant suit would be moot. The Commission determined that the state legislatures were the proper forum for Intake's request. Attempts to pass favorable legislation during Montana's 1979 session were futile.

take filed its second amended complaint in December 1981. Defendants moved to dismiss, and briefing continued during 1982. Oral argument on the motion to dismiss was heard April 19, 1983, before Judges Goodwin, Battin and Hatfield.

PLAINTIFF'S CONTENTIONS

Intake seeks a declaration from this Court of the legality of the restrictions placed on interbasin and interstate transfers of Yellowstone River water. Article X of the Compact restricts interbasin uses of Yellowstone River water by requiring all signatory states to consent to interbasin diversion:

> No waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states [Montana, Wyoming, North Dakota]. . . .

Another obstacle to the interstate diversion of Yellowstone River water was, at the time suit was filed, Montana Code Annotated (hereinafter MCA) § 85-1-121 (1979); however, the Montana legislature repealed this statute in its entirety during the 1983 session, effective April 29, 1983. 1983 Laws of Montana, Cptr. 706, House Bill No. 908. Consequently, consideration of the claims premised on this statute—Count I of Intake's second amended complaint—need not be addressed by the Court.

Count II attacks the constitutionality of Article X of the Yellowstone River Compact (quoted above in pertinent part) based on that article's alleged impermissible burden on interstate commerce in that it requires unanimous consent of three states before interbasin water transfer is allowed. Intake seeks both a declaratory judgment that Article X of the Compact is unconstitutional and a permanent injunction preventing enforcement. We find that because the Compact was ratified by Congress, Article X must be interpreted as federal law, immune

from Commerce Clause attacks. Thus, Count II fails to state a claim for relief.

Count III attacks the constitutionality of Article X of the Compact based on a denial of the Fourteenth Amendment right to equal protection. The equal protection claim arises because the right to divert Yellowstone River water out of the Basin is conditional pending consent of Montana, Wyoming and North Dakota, although interbasin diversion from other Montana rivers is not subject to the same constraint. Briefly stated, the guarantees of equal protection apply to people, not geographical areas, and, hence, Count III must be dismissed.

Count IV seeks a declaration of this Court that the Compact does not apply to Intake's planned diversion. Intake claims that the Yellowstone River at Dawson, Montana, is not part of the waterway regulated by the Compact. Intake seeks an injunction permanently restraining enforcement of the Compact's prohibitions against the proposed interbasin water transfer from the diversion site at Dawson. Because the interpretation of the Compact necessary for Intake's contention to state a claim is totally without foundation, Count IV must be dismissed.

A motion to dismiss pursuant to F.R.Civ.P. 12(b)(6) is viewed with disfavor because the primary objective of the legal system is to obtain a determination on the merits, not a dismissal based on pleadings rather than proof. *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.2d 208 (9th Cir.1957). For this reason, a complaint is liberally construed in the light most favorable to the plaintiff. The Court must take as true the factual allegations of the complaint. *Experimental Engineering v. United Technologies*, 614 F.2d 1244 (9th Cir.1980); 2A Moore's Federal Practice, ¶ 12.08. A complaint will not be dismissed for failure to state a claim unless it is abundantly clear that the plaintiff is not entitled to any

relief under any set of facts which could be proved in support of the claim. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Jablon v. Dean Witter & Company*, 614 F.2d 677 (9th Cir.1980).

DISCUSSION

COUNT II: Commerce Clause

Intake alleges in its Count II that Article X of the Compact, as state law, places a constitutionally impermissible burden on interstate commerce[3] because the Article requires unanimous consent from Montana, Wyoming and North Dakota before Yellowstone River water may be transferred outside the Yellowstone River Basin. Defendants do not directly contest the sufficiency of this count. Instead, defendants rely on the following argument: The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. We find this argument compelling. When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law. Therefore, Count II fails to state a claim for relief.

Strong authority supports the proposition that the Compact is federal law. *See Texas v. New Mexico*, 462 U.S. 554, 103 S.Ct. 2558, 77 L.Ed.2d 1 (1983); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir.1974). Federal legislation is not subject to the restrictions that the Commerce Clause imposes on state laws affecting commerce. *Prudential In-*

---

[3] Constitution, Art. I, § 8, cl. 3.

surance Co. v. Benjamin, 328 U.S. 408, 423, 66 S.Ct. 1142, 1151, 90 L.Ed. 1342 (1946). Under the Commerce Clause, Congress may, unlike the states, enact legislation that affects states unequally. *Hodel v. Indiana*, 452 U.S. 314, 332, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981) (Congress may impose legislation that respects geographic differences). Thus, to the extent the Compact is federal law, this Court cannot invalidate it on the basis of its effects on interstate commerce.

Just as Congress may itself enact a law that interferes with interstate commerce, it may also give its approval to a state law interfering with interstate commerce and thereby immunize the law from challenge under the Commerce Clause. *See, e.g., Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). In many cases, the issue is whether Congress in fact approved the state law for which immunity from Commerce Clause attack is claimed. That is not an issue in the present case; the Compact was before Congress and Congress voted to approve it.

Because Congress voted directly on the Compact, the cases that require an express statement of Congressional intent to immunize state legislation from Commerce Clause challenge, *e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 343, 102 S.Ct. 1096, 1102, 71 L.Ed.2d 188 (1982); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 3466, 73 L.Ed.2d 1254 (1982), are inapposite. In those cases, Congress had enacted laws that dealt in general terms with a given subject, and it was argued that this general treatment of the subject revealed Congress's intent to immunize from Commerce Clause attack the state laws at issue in those cases. In *New England Power*, New Hampshire argued that a general saving clause in the Federal Water Power Act immunized the New Hampshire statute at issue from a Commerce Clause attack. In *Sporhase*, Nebraska argued that Congress's deference to state water

law in various unrelated federal statutes and its approval of interstate compacts dealing with water rights showed that Congress intended to defer to other state statutes dealing with water rights, including the Nebraska statute at issue in *Sporhase*. In both cases, the state law at issue had not been placed directly before Congress for its approval. The Court held that Congress had not stated explicitly enough an intent to immunize the state statutes from Commerce Clause attacks and voided both statutes as impermissible burdens on interstate commerce. Here, Congress's approval of the Yellowstone River Compact in 1951 may be considered the express statement of intent to immunize the Compact from attack that the Court found lacking in *Sporhase*.

Furthermore, the Constitution requires congressional consent to an interstate compact only when the compact threatens to encroach upon the supremacy of the United States. A threat to the supremacy of the United States necessarily entails a threat to one of Congress's enumerated legislative powers since those powers are the source of supreme federal authority. Thus, when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area. *See Cuyler v. Adams*, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). In the present case, therefore, to the extent that the Compact interferes with interstate commerce, Congress has exercised its commerce power in approving the Compact. For the reasons discussed above, defendants' arguments that the Yellowstone River Compact is immune to Commerce Clause attack persuade this Court that defendants' motion to dismiss Count II should be granted.

COUNT III: Equal Protection

Intake alleges in its Count III that it is a violation of equal protection under the Fourteenth Amendment for

the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the Compact. Second Amended Complaint, Count III, ¶ XII. For the reasons discussed below, Count III must be dismissed for failure to state a claim.

It is well settled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state:

> [W]e have held that the equal protection clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. *McGowan v. Maryland*, 366 U.S. 420, 426-27, 81 S.Ct. 1101, 1105-06, 6 L.Ed.2d 393 (1960).

Legislation such as the Yellowstone River Compact, that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 2386, 69 L.Ed.2d 40 (1981); moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. *Id.*

That the signatory states have an interest in the equitable use and management of Yellowstone River water cannot be doubted. The means employed by the affected states to achieve this legitimate governmental purpose—an interstate compact—are quite logically limited to the states containing the Yellowstone River Basin. That the Compact is limited to the Yellowstone River Basin, and other river basins are not so managed, is not a constitutional defect. Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. *See McGowan v. Maryland*, 366 U.S.

420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Considering the facts as alleged by Intake to be true, Intake cannot, as a matter of law, meet the heavy burden to show that the Yellowstone River compact is not rationally related to a legitimate governmental purpose. Since every water appropriation from the Yellowstone River Basin is subject to the Compact, there is no violation of the guarantees of equal protection. Therefore, Count III must be dismissed.

COUNT IV: Compact Article V

Intake alleges in its Count IV that the proposed diversion of Yellowstone River water at Dawson, Montana, is outside any regulatory provision of the Compact. Intake's claim is based on Article V of the Compact, which apportions among Wyoming and Montana unused and unappropriated waters of Wyoming-originating tributaries. These waters are defined by river flow between certain points; however, the Yellowstone River at the proposed diversion site is not specifically apportioned by Article V. Intake concludes that, because the water at the proposed diversion point is not specifically apportioned, Intake can divert Yellowstone River water without permission of the Commission. For the reasons discussed below, Intake's Count IV fails to state a claim and must be dismissed.

Article I of the Compact states:

> Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state shall be subject to the terms of this Compact. . . . Article I(B).

By the plain language of the above Article, Intake, a corporation seeking to use waters of the Yellowstone River under authority of the State of Montana, is subject to the terms of the Compact. *See generally Montana Department of Natural Resources and Conservation v. Intake Water Company*, 171 Mont. 416, 558 P.2d 1110 (1976) (Intake has a valid water appropriation for its planned diversion at Dawson, Montana).

Furthermore, contrary to the assertions of Intake, the Yellowstone River at Dawson is within the purview of the Compact. The Compact defines its terms in Article II. The term "Yellowstone River Basin" means the area in Wyoming, Montana and North Dakota drained by the Yellowstone River and its tributaries. Article II(C). The "Yellowstone River system" is defined as the Yellowstone River and all its tributaries, including springs and swamps, from their sources to where the Yellowstone River empties into the Missouri. Article II(D). "Water diversion" means taking or removing water from the Yellowstone River or any tributary when the water is not returned directly into the flowing water from which it is taken. Article II(G). The uncontroverted facts show that the planned diversion at Dawson is within the Yellowstone River Basin, and is on the Yellowstone River system, and is therefore within the purview of the Compact.

Intake misreads Article V of the Compact when it cites Article V as an exhaustive apportionment of Yellowstone River water. Article V only purports to allocate between Montana and Wyoming unused and unappropriated water of four tributaries of the Yellowstone that originate in Wyoming. The Compact refers to all the waters of the Yellowstone River Basin, not just the apportionment of the four principal Wyoming-originating tributaries.

Applying well-known rules of statutory construction and common sense, the plain meaning of Article V gives

no support whatsoever to Intake's claim that its proposed diversion is outside the purview of the Compact. Taking all factual statements alleged by Intake as true, Count IV fails to state a claim.

Because the Court has disposed of each count of plaintiff's second amended complaint based on a separate consideration of the legal merit of each count, it is unnecessary for the Court to consider the general arguments raised by defendants, such as failure to join an indispensable party and exhaustion.

CONCLUSION

After careful evaluation by this Court, we find that Intake Water Company's second amended complaint fails to state a claim for relief and must be dismissed.

An appropriate order in conformance with this Opinion will issue.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

Civil Docket No. 1184

INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff-Appellant,

—vs—

YELLOW RIVER COMPACT COMMISSION; GARY FRITZ; GEORGE CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of the State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants-Appellees.

[Filed May 29, 1984]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Intake Water Company, the plaintiff above named, being in receipt of the Order of the District Court dated the 30th day of April, 1984, denying Plaintiff's Motion to Alter, Amend and/or Vacate Judgment filed herein pursuant to Rule 59(e), F.R.Civ.P., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 25th day of October, 1983, dismissing plaintiff's Second Amended Complaint for Declaratory Judgment and Application for Injunctive

Relief from Three-Judge Court, pursuant to Order of the District Court based on a Memorandum Opinion of the District Court, both dated the 11th day of October, 1983.

This is a partial appeal from that portion of the Judgment denying plaintiff's request for declaratory relief. No appeal is taken from that portion of the Judgment denying plaintiff's request for injunctive relief. Accordingly, plaintiff, as appellant, believes that jurisdiction lies in the Court of Appeals as a matter of right. 28 U.S.C. 1291 and Rules 3 and 4, F.R.App.P. *Cf. Heckler* v. *Edwards*, 52 U.S.L.W. 4373 (S.Ct. March 21, 1984). As a protective measure, however, plaintiff intends to file a timely jurisdictional statement in the United States Supreme Court with the request that it defer consideration of this case pending the disposition of this case in the Court of Appeals. The matter of appellate jurisdiction will be fully addressed in plaintiff's brief on the merits as appellant in the Court of Appeals.

DATED this 25th day of May, 1984.

LOBLE & PAULY, P.C.

By /s/ Peter C. Pauly
PETER C. PAULY
Attorneys for
Plaintiff-Appellant,
Intake Water Company,
a Delaware corporation
833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

October 29, 1984

Mr. E. Barrett Prettyman Jr.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072

Re: Intake Water Company,
v. Yellowstone River Compact Commission, et al.
No. 84-131

Dear Mr. Prettyman:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction.

Very truly yours,

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS
Clerk

YELLOWSTONE RIVER COMPACT
CHAPTER 629—PUBLIC LAW 231

[S. 1311]

An Act granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The consent of the Congress is hereby given to an interstate compact relating to the waters of the Yellowstone River which was signed (after negotiations in which a representative of the United States duly appointed by the President participated) by the Commissioners for the States of Montana, North Dakota, and Wyoming on December 8, 1950, at Billings, Montana, and which was thereafter ratified by the legislatures of each of the States aforesaid as provided by Public Law 83, Eighty-first Congress, approved June 2, 1949, which compact reads as follows:

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, ac-

knowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck
A. W. Bradshaw
H. W. Bunston
John Hersog
John M. Jarussi
Ashton Jones
Chris. Josephson
A. Wallace Kingsbury
P. F. Leonard
Walter M. McLaughlin
Dave M. Manning
Joseph Muggli
Chester E. Onstad
Ed F. Parriott
R. R. Renne
Keith W. Trout

For the State of North Dakota:

I. A. Acker
Einar H. Dahl
J. J. Walsh

For the State of Wyoming:

L. C. Bishop
Earl T. Bower

J. Harold Cash
Ben F. Cochrane
Ernest J. Goppert
Richard L. Greene
E. C. Gwillim
E. J. Johnson
Lee E. Keith
N. V. Kurtz
Harry L. Littlefield
R. E. McNally
Will G. Metz
Mark N. Partridge
Alonzo R. Shreve
Charles M. Smith
Leonard F. Thornton
M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivsions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be

subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are

respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions

and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective States, and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever Federal agencies may succeed to the functions and duties of these agencies, and such other Federal officers and officers of appropriate agencies of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex-officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper ad-

ministration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. Appropriate rights to the beneficial uses of the water of the Yellowstone River System existing in each

signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

   a. To Wyoming 60%
      To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Bighorn River (Exclusive of Little Bighorn River)

   a. To Wyoming 80%
      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

   a. To Wyoming 40%
      To Montana 60%

b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (including the Little Powder River)

a. To Wyoming 42%
To Montana 58%

b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and

North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 20-acre feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;
Acreage irrigated;
Acreage irrigable under existing works; and
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights

to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a

portion or all of the lands irrigated are in another signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: *Provided*, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges[85a] granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be construed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the

---

[85a] Probably should read "privileges".

laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continued unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal, or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principal or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

In Witness Whereof the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners of the State of Montana:

Fred E. Buck	/s/ Fred E. Buck
A. W. Bradshaw	/s/ A. W. Bradshaw
H. W. Bunston	/s/ H. W. Bunston

John Herzog	/s/ John Herzog
John M. Jarussi	/s/ John M. Jarussi
Ashton Jones	/s/ Ashton Jones
Chris. Josephson	/s/ Chis. Josephson
A. Wallace Kingsbury	/s/ A. Wallace Kingsbury
P. F. Leonard	/s/ P. F. Leonard
Walter M. McLaughlin	/s/ Walter M. McLaughlin
Dave M. Manning	/s/ Dave M. Manning
Joseph Muggli	/s/ Joseph Muggli
Chester E. Onstad	/s/ Chester E. Onstad
Ed F. Parriott	/s/ Ed F. Parriott
R. R. Renne	/s/ R. R. Renne
Keith W. Trout	/s/ Keith W. Trout

Commissioners of the State of North Dakota:

I. A. Acker	/s/ I. A. Acker
Einar H. Dahl	/s/ Einar H. Dahl
J. J. Walsh	/s/ J. J. Walsh

Commissioners for the State of Wyoming:

L. C. Bishop	/s/ L. C. Bishop
Earl T. Bower	/s/ Earl T. Bower
J. Harold Cash	/s/ J. Harold Cash
Ben F. Cochrane	/s/ Ben F. Cochrane
Ernest J. Goppert	/s/ Ernest J. Goppert
Richard L. Greene	/s/ Richard L. Greene
E. C. Gwillim	/s/ E. C. Gwillim
E. J. Johnson	/s/ E. J. Johnson
Lee E. Keith	/s/ Lee E. Keith
N. V. Kurtz	/s/ N. V. Kurtz
Harry L. Littlefield	/s/ Harry L. Littlefield
R. E. McNally	/s/ R. E. McNally
Will G. Metz	/s/ Will G. Metz
Mark N. Patridge	/s/ Mark N. Patridge
Alonzo R. Shreve	/s/ Alonzo R. Sherve
Charles M. Smith	/s/ Charles M. Smith
Leonard F. Thornton	/s/ Leonard F. Thornton
M. B. Walker	/s/ M. B. Walker

"I have participated in the negotiation of this Compact and intend to report favorably thereon to the Congress of the United States.

/s/ R. J. Newell
R. J. NEWELL,

Representative of the United States of America."

Sec. 2. The right to alter, amend or repeal section 1 of this Act is expressly reserved. This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this Act shall be held to affect rights so vested.

Approved October 30, 1951.

TENNECO INC. (PARENT OF PETITIONER INTAKE) AND SUBSIDIARIES AND AFFILIATES

As of June 30, 1985

TENNECO INC. (Delaware)

Albright & Wilson Inc. (Delaware)	100%
Car-X Service Systems, Inc. (Delaware)	100
Channel Industrial Sales Company (Delaware)	100
De Koven Manufacturing Company (Wisconsin)	100
East Tennessee Natural Gas Company (Tennessee)	100
Eastern Insurance Company Limited (Bermuda)	100
ERCO Industries Inc. (Delaware)	100
Gas Ships, Inc. (Delaware)	100
Houston Oil & Minerals Corporation (Nevada)	100
Houston Oil & Minerals Exploration Company (Texas)	100
Houston Oil & Minerals Products Company (Texas)	100
Houston Oil International, Inc. (Texas)	100
HOCOL, S.A. (Cayman Islands)	100
International Harvester France S.A. (France)	100
International Harvester Belgium (Belgium)	100
International Harvester Company mbH (Germany)	100
Poclain S.A. (France)	44
Agencias Petroleras, Ltda. (Colombia)	100
Construcciones Agrometalicas Levante, S.A. (Spain)	100

Subsidiaries of Tenneco Inc. (continued)

Compania Tecnico Envasadora S.A. (Spain) ...	80%
Marchon Surfac S.A. - (Spain)	100
Compania Tecnico Envasadora S.A. (Spain)	20
Houston Oil & Minerals of Colombia, Inc. (Texas)	100
Houston Oil & Minerals of Dubai, Inc. (Texas)	100
Zedco Energy (Dubai)	100
Houston Oil & Minerals of Indonesia, Inc. (Texas)	100
Houston Oil & Minerals of Sharjah, Inc. (Texas)	100
Houston Oil & Minerals of The Netherlands, Inc. (Texas) ..	100
Houston Oil & Minerals of The Philippines, Inc. (Texas) ..	100
Houston Oil & Minerals of Tunisia, Inc. (Texas)	100
Houston Oil & Minerals of U.K., Inc. (Texas)	100
Houston Oil International of The Philippines, Inc. (Texas)	100
Tenneco Oil & Minerals of UMM AL-QAIWAIN (Texas)	100
Tenneco Oil of Gabon, Inc. (Texas)	100
Houston Production Company (Texas).	100
Houston Royalty Company (Nevada) ..	100
Magrange Inc. (Texas)	100
International Harvester Company of Great Britain Limited (United Kingdom)	100
Case Credit Limited (United Kingdom)	100
Intake Water Company (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Kern River Corporation (Delaware)	100%
Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware)	50
(50% ownership by The Williams Companies, an outside company)	
Kern River Service Corporation (Delaware)	50
(50% ownership by The Williams Companies, an outside company)	
Lakefront Manufacturing, Inc. (Delaware)	100
Land Ventures Inc. (Delaware)	100
Lorneterm LNG Limited (Canada)	100
Midwestern Gas Transmission Company (Delaware)	100
Monroe Auto Equipment Company (Delaware)	100
E Z Ride Shock Absorber Company (Michigan)	100
Monroe Argentina S.A.I.C. y F. (Argentina)	100
Monroe Auto Equipment France S.A. (France)	100
Monroe Auto Equipment GmbH (Germany)	100
Monroe do Brasil Industria e Comercio Ltda. (Brazil)	100
Monroe Auto Pecas S.A. (Brazil)	80
Monroe Espana SA (Spain)	100
Monroe Japan Co. Ltd. (Japan)	100

Subsidiaries of Tenneco Inc. (continued)

Regal Ride Shock Absorber Company (Michigan)	100%
Sudinpar Holding Establissement (Liechtenstein)	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)	98
Tenneco Automotive International Sales Corporation (Delaware)	100
New Tenn Company (Delaware)	100
Northeastern Gas Transmission Company (Delaware)	100
Seahorse Offshore Transmission Company (Delaware)	100
Shipping Ventures Inc. I (Delaware)	100
Shipping Ventures Inc. II (Delaware)	100
Shipping Ventures Inc. III (Delaware)	100
Speedy Muffler King, Inc. (Delaware)	100
Discoverer Services, Inc. (Delaware)	100
SMK, Inc. (Delaware)	100
State Gas Pipeline Company (Delaware)	100
Tenneco Alaska, Inc. (Delaware)	100
Tenneco Border Company (Delaware)	100
Tenneco Coal Company (Delaware)	100
Tenneco Coal Conversion Co. (Delaware)	100
Tenneco Coal Gasification Co. (Delaware)	100
Tenneco Communications Corporation (Delaware)	100
Tenneco Corporation (Delaware)	100
Blue Flame Gas Corporation (Delaware)	100
Channel Industries Gas Company (Delaware)	100
Collins Pipeline Company (Delaware)	80
Columbine Casualty Company (Colorado)	100
International Sourcing and Counter-trade Company (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Kern County Land Company (Delaware)	100%
Boquillas Cattle Company (Arizona)	100
J. I. Case Company (Delaware)	100
Case Engine Holding Company, Inc. (Delaware)	100
Consolidated Diesel Company (North Carolina Partnership) (Case Engine Holding Company has 50% ownership as Partner)	
Consolidated Diesel, Inc. (Delaware)	100
Drott Manufacturing Company (Delaware)	100
Grand Detour Plow Company (Wisconsin)	100
Kase, S.A. De C. V. (Mexico)	100
J. I. Case Argentina, S.A. (Argentina)	100
J. I. Case Credit Corporation (Wisconsin)	100
J. I. Case International, S.A. (Venezuela)	100
J. I. Case International Sales Corporation (Delaware)	100
J. I. Case Leasing Corporation (Wisconsin)	100
J. I. Case Mfg. Company, Inc. (Wyoming)	100
J. I. Case Threshing Machine Company (Wisconsin)	100
Pryor Foundry, Inc. (Oklahoma)	100
Tenneco Canada Inc. (Ontario)	100
Erco Industries of Canada, Limited (Canada)	100

Subsidiaries of Tenneco Inc. (continued)

Dunville Mining Co., Ltd. (Canada)	100%
Electric Reduction Sales Co., Ltd. (Canada)	100
J. I. Case do Brasil & Cia. (Brazil)	100
Case Capital Assets Management S/C Ltda. (Brazil)	100
The Case Company (Wisconsin)	100
Pueblo Del Sol Water Company (Arizona)	100
Tenneco West, Inc. (Delaware)	100
Ag-Ventures, Incorporated (California)	100
Cal-Date Company (California)	100
California Almond Orchards, Inc. (California)	100
California Harvest Shops, Incorporated (California)	100
Grandma Mac's Orchard, Inc. (California)	100
H-M-T Inc. (California)	100
Heggblade-Marguleas-Tenneco, Inc. (California)	100
House of Almonds, Inc. (Delaware)	100
House of Almonds, Inc. (North Dakota)	100
Kern County Land Company, Inc. (California)	100
Kern Island Water Company (California)	100
Kern River Canal and Irrigating Company (California)	98
Sun Giant Sales Corporation (California)	100

Subsidiaries of Tenneco Inc. (continued)

Tenneco Exploration, Ltd. (Texas Limited Partnership). (Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has ownership as Limited Partner)	
Tenneco Farming Company (California)	100%
Tenneco Property Development Corporation (California)	100
LHC Pipeline Company (Delaware)	100
Marlin Drilling Co., Inc. (Delaware)	100
Bluefin Supply Company (Delaware)	100
Marlin Ethiopia, Inc. (Delaware)	100
Marlin International Drilling Company (Delaware)	100
Marlin Colombia Drilling Co. Inc. (Delaware)	100
Marlin-West Drilling Co., Inc. (Delaware)	100
MHC Drilling Co., Inc. (Delaware)	100
Mitchell Supreme Fuel Company (Delaware)	100
Newport News Shipbuilding and Dry Dock Company (Virginia)	100
Asheville Industries Inc. (North Carolina)	100
Greenville Metal Manufacturing, Inc. (Virginia)	100

Subsidiaries of Tenneco Inc. (continued)

The James River Oyster Corporation (Virginia)	100%
Newport News Industrial Corporation (Virginia)	100
Newport News Industrial Corporation of Ohio (Ohio)	100
Newport News Offshore Systems Corporation (Virginia)	100
Newport News Reactor Services, Inc. (Virginia)	100
Newport News Technical Services, Inc. (Pennsylvania)	100
Newport News Technical Services Inc. (Wisconsin)	100
Packaging Corporation of America (Delaware)	100
ABCO Cartage Company (Michigan)	100
Ekco Products, Inc. (Illinois)	100
Alcan Ekco Limited (United Kingdom)	50
C & W Avery Limited (United Kingdom)	100
A/S Haustrup-Ekco Aluminium-Emballage (Denmark)	50
Al-Forpackning AB (Sweden)	100
Plus Pack AB Svenska Haustrup-Ekco (Sweden)	100
Plus Pack A/S (Norway)	100
Plus Pack GmbH (Austria)	100
Plus Pack GmbH (Switzerland)	100
Ekco N.V. (Belgium)	100
Ekco GmbH (Germany)	100
Ekco S.A.R.L. (France)	100
Glasco Corp. (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Lake States Carriers, Inc. (Illinois)	100%
Plus Container Machinery, Inc. (Illinois)	100
Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan)	50
Skogstre A/S (Norway)	50
Tennessee River Pulp & Paper Company (Delaware)	100
The Corinth and Counce Railroad Company (Mississippi)	100
Petro-Tex Chemical Corporation (Delaware)	100
SWL Development Corp. (Texas)	100
Counce Limited Partnership (Texas Limited Partnership) (SWL Development Corp. has 5% ownership as General Partner and Southwestern Life Insurance Company has 95% ownership as Limited Partner).	
Counce Finance Corporation (Delaware)	100
SWL Security Corp. (Texas)	100
T & M Terminal Company (Delaware)	80
Tenneco Aviation Limited (Delaware)	100
Tenneco Credit Corporation (Delaware)	100
Tenneco Cogeneration Development Company (Delaware)	100
Tenneco Financial Services Inc. (Delaware)	100
Tenneco Asset Management Company (Delaware)	100
Tenneco Asset Planning Company (Delaware)	100
Tenneco Inc. (Nevada)	100
Tenneco Insurance Company (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Philadelphia Life Insurance Company (Pennsylvania) 100%

Argosy Offshore Ltd. (Texas Limited Partnership)

(FC Marine Inc. has 1% ownership as General Partner; Philadelphia Life Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)

LEDCO, Ltd. (Pennsylvania Limited Partnership)

(Philadelphia Life Insurance Company has 99% ownership as Limited Partner and One Independence Corporation has 1% ownership as General Partner)

Resource Oil and Gas Company (Delaware) 100

TINCO, Ltd. (Texas Limited Partnership)

(LEDCO, Ltd. has 43.3% ownership as Limited Partner and Tenneco Oil Company has 56.7% ownership as General Partner)

Multistate Oil Properties N.V. (Netherlands Antilles) 100

One Independence Corporation (Delaware) 100

Subsidiaries of Tenneco Inc. (continued)

LEDCO, Ltd. (Pennsylvania Limited Partnership) (One Independence Corporation has 1% ownership as General Partner and Philadelphia Life Insurance Company has 99% ownership as Limited Partner)	
Philadelphia American Life Insurance Company (Pennsylvania)	100%
American MedCAP, Inc. (Delaware)	100
Philadelphia Life Corporation (Pennsylvania)	100
Philadelphia Life Enterprises Inc. (Delaware)	100
Philadelphia National Life Insurance Company (Delaware)	100
San Francisco Life Insurance Company (California)	100
Philadelphia Life Asset Planning Company (Pennsylvania)	100
Tenneco Insurance Ventures Inc. (Delaware)	50
Southwestern Life Insurance Company (Texas)	100
Counce Limited Partnership (Texas Limited Partnership) (Southwestern Life Insurance Company has 95% ownership as Limited Partner and SWL Development Corp. has 5% ownership as General Partner)	
Counce Finance Corporation (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Southwestern Insurance Holding Company (Delaware)	100%
SWL Re Life Insurance Company (Texas)	100
Southwestern General Life Insurance Company (Texas)	100
Security Life Insurance Company of Georgia (Georgia)	100
Southwestern Management & Research Corp. (Delaware)	100
Tenneco Insurance Ventures Inc. (Delaware)	50
The Insurers Series Fund, Inc. (Delaware)	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Southwestern Life Insurance Company has 50% ownership as Limited Partner)	
Tenneco Storage Capital Corporation (Delaware)	100
Tenneco Minerals Company (Delaware)	100
Prometheus Minerals (Canada) Ltd. (Canada)	100
Tenneco Minerals Company of Australia, Inc. (Delaware)	100
Tenneco Oil & Minerals of Australia, Inc. (Texas)	100
Tenneco Oil & Minerals of Australia (Louisiana) Ltd. (Louisiana)	100
Windy Point Minerals, Ltd. (Canada)	100

Subisidiaries of Tenneco Inc. (continued)

Tenneco Ocean Metals Development Corporation (Delaware)	100%
Tenneco Oil Company (Delaware)	100
Caldyne, Inc. (Delaware)	100
Direct Oil Corporation of Texas (Texas)	100
Eco Pipeline Inc. (California)	100
FC Marine Inc. (Delaware)	75
(Skips A/S Tudor owns 25%)	
Argosy Offshore Ltd. (Texas Limited Partnership)	
(FC Marine Inc. has 1% ownership as General Partner; Philadelphia Life Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)	
GEC Oil and Gas Company of Houston (Delaware)	100
LaTerre Development Corp. (Delaware)	100
LaTerre Petroleum of Italy, Inc. (Louisiana)	100
LaTerre Petroleum (U.K.), Inc. (Delaware)	100
Mistal, Inc. (Delaware)	51
Operators, Inc. (Delaware)	100
Ship Channel Chemicals Company (Delaware)	100
TENN-USS Chemicals Company (Texas General Partnership)	
(Ship Channel Chemicals Company has 50% ownership as General Partner)	

Subisidiaries of Tenneco Inc. (continued)

TENN-USS Chemicals Finance Corporation (Delaware)	50%
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)	
Tenneco Exploration, Ltd. (Texas Limited Partnership)	
(Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership)	
(Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc., has 50% ownership as Limited Partner)	
Tenneco LaTerre, Inc. (Delaware)	100
Tenneco Marine Services, Inc. (Delaware)	100
Tenneco OCS Company, Inc. (Delaware)	100
Tenneco Oil Pipeline Company (Delaware)	100
Tenneco Retail Service Company (Delaware)	100
Tenneco Retail Service Company of Texas (Texas)	100
Tenneco Shale Oil Company (Delaware)	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership)	

Subisidiaries of Tenneco Inc. (continued)

(Tenneco Oil Company has 50% ownership as General Partner and Southwestern Life Insurance Company has 50% as Limited Partner)	
Tenneco Storage Capital Corporation	100%
TINCO, Ltd. (Texas Limited Partnership) (Tenneco Oil Company has 56.7% ownership as General Partner and LEDCO, Ltd. has 43.3% ownership as Limited Partner)	
Tenneco Oil Company of Nigeria (Delaware)	100
Tenneco Oil of Nigeria Unlimited (Nigeria)	50
Tenneco Phosphate, Inc. (Delaware)	100
Tenneco Polymers, Inc. (Delaware)	100
Heyden Newport Chemical Corporation (Delaware)	100
Tenneco Eastern Realty, Inc. (New Jersey)	100
Tenneco Resins, Inc. (Delaware)	100
Tenneco SNG Inc. (Delaware)	100
Tenneco Synfuels Company (Delaware)	100
Tenneco Uranium, Inc. (Delaware)	100
Tennessee Gas Pipeline Corporation (Delaware)	100
Tennessee Overthrust Gas Company (Delaware)	100
Tenngasco Corporation (Delaware)	100
Creole Gas Pipeline Corporation (Louisiana)	100
Tenngasco Exchange Corporation (Delaware)	100
Tenngasco Gas Gathering Company (Delaware)	50

Subisidiaries of Tenneco Inc. (continued)

Tenngasco Gas Supply Company (Delaware)	100%
HT Gathering Company (Delaware)	50
Oasis Pipeline Company (Delaware)	20
Tenngasco Marketing Corporation (Delaware)	100
TLC Oil Company (Delaware)	100
Walker Deutschland GmbH (Germany)	100
West Africa Corporation (Delaware)	100
Tenneco Oil Company of Nigeria Unlimited (Nigeria)	50
Tenneco Delta XII Gas Co., Inc. (Delaware)	100
Tenneco LNG International Inc. (Panama)	100
Tenneco Energy Ltd. (Canada)	100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands)	100
Tenneco InterAmerica Inc. (Delaware)	100
Tenneco International Energy, Inc. (Delaware)	100
Tenneco International Energy, Inc. (Panama)	100
Tenneco International Inc. (Delaware)	100
A B Starla-Werken (Sweden)	100
J. I. Case Sweden A.B. (Sweden)	100
Sara Gretes Cafeteria AB (Sweden)	50
Adela Investment Company S.A. (Luxembourg)	91
Case Belgium Inc. (Delaware)	100
Case France, S.A. (France)	100
Societe Francaise Immobiliere Franim (France)	100
Case Iberica, Inc. (Delaware)	100

Subisidiaries of Tenneco Inc. (continued)

Case Iberica, S.A. (Spain)	100%
Case Poclain S.A. (Spain)	100
Case Tracteurs S.A. (France)	100
Case Traktoren GmbH (Germany)	100
Compania de Financiacion Case, S.A. (Spain)	100
Establissement Robert Bellanger, S.A. (France)	100
Speedy Et Cie SNC (France) (Establissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
International Excavator Holdings, Inc. (Delaware)	100
Excavator Enterprises, Inc. (Delaware)	100
J. I. Case (Australia) Pty. Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case S.W.A. (Proprietary) Ltd. (South West Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
Omni-Pac GmbH (Germany). 1	
Omni-Pac S.A.R.L. (France)	97
Pit-Stop Auto Services GmbH (Germany)	100

Subsidiaries of Tenneco Inc. (continued)

Poclain do Brasil S.A. (Brazil)	100%
P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99
Riverside Date International, Inc. (Delaware)	100
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (Poclain-Monroe-Petro-Tex) N. V. (Belgium)	100
Somadoc N. V. (Belgium)	100
Societe Anonyme Industrielle des Resines (France)	100
Speedy Inc. (Delaware)	100
Speedy Et Cie SNC (France) (Speedy Inc. has 1% ownership and Establissement Robert Bellanger, S.A. has 99% ownership.)	
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Europe, Inc. (Delaware)	100
Tenneco Deutschland Beteiligungs GmbH (Germany)	100
Case Vibromax GmbH (Germany)	98
Case Vibromax GmbH und Co. (Germany)	2
Vibromax Australia (Pty) Ltd. (Australia)	100
Vibromax France SARL (France)	99
Vibromax SCI (France)	99
Omni-Pac GmbH (Germany)	99
Omni-Pac ApS (Denmark)	100
Omni-Pac A.B. (Sweden)	100
Omni-Pac S.A.R.L. (France)	3
Poclain GmbH (Germany)	100

Subsidiaries of Tenneco Inc. (continued)

Case Poclain GmbH & Co. (Germany)	2%
Chance Gesellschaft Fuer Baumachinau MbH	100
Wilhelm Weller, Herstellung und Vertrieb von Strassenwalzen, GmbH (Germany)	100
Vibromax France SARL (France)	1
Vibromax SCI (France)	99
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Ethiopia, Inc. (Delaware)	100
Tenneco Europe Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Holdings B. V. (Netherlands)	100
Tenneco Nederland B. V. (Netherlands)	100
Case Poclain GmbH & Co. (Germany)	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany)	100
Vibromax France SARL (France)	99
SCI Vibromax (France)	100
Gebr. Broere B. V. (Netherlands)	100
Antwerp United Tanker Agencies N. V. (Belgium)	100
Depositas Del Norte, S.A. (Spain)	50

Subsidiaries of Tenneco Inc. (continued)

Tank Terminals Rotterdam, B. V. (Netherlands)	100%
Tankvaart Dordrecht, B. V. (Netherlands)	100
Case Vibromax GmbH und Co. (Germany)	98
Vibromax Australia (Pty) Ltd. (Australia)	100
Tenneco Transicol B. V. (Netherlands)	100
Nederlandsche Bewoid Maatachappij, B. V. (Netherlands)	100
Tenneco Holdings Danmark A/S (Denmark)	100
Case Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
A/S International Harvester Company (Denmark)	100
Lydex A/S (Denmark)	100
Nordisk Case A/S (Denmark)	100
Tenneco Indonesia, Inc. (Delaware)	100
Tenneco International Marketing Company (Delaware)	100
Tenneco International N. V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100
Tenneco Oil Company of Colombia (Delaware)	100

Subsidiaries of Tenneco Inc. (continued)

Tenneco Oil Company Norsk A/S (Norway)	100%
Tenneco Oil Company of Argentina (Delaware)	100
Tenneco Oil Company of Peru (Delaware)	100
Tenneco Oil Company of the Bahamas (Delaware)	100
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d' Ivoire, Inc. (Delaware)	100
Tenneco Saudi Arabia, Inc. (Delaware)	100
Tenneco South Africa, Inc. (Delaware)	100
Tenneco Sudan, Inc. (Delaware)	100
Tenneco Thailand, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100
Albright & Wilson (Finance) Limited (United Kingdom)	100
Case Poclain Corporation Limited (Delaware)	100
Old TIFL Limited (United Kingdom)	100
Omni-Pac U.K. Limited (United Kingdom)	100
Hartmann Fibre Limited (United Kingdom)	100
Tenneco International Finance, Ltd. (United Kingdom)	100
Case Credits Limited (United Kingdom)	100
Tenneco International Finance BV (Netherlands)	100

Subsidiaries of Tenneco Inc. (continued)

Tenneco International Finance Corporation Ltd. (Delaware)	100%
Tenneco International Holdings Limited (United Kingdom)	100
Albright & Wilson Limited (United Kingdom)	100
ACC (Fertilisers) Ltd. (United Kingdom)	100
FCL Crop Protection, Ltd. (United Kingdom)	100
Robt. Stephenson & Son, Ltd. (United Kingdom)	100
The Farmers Co., Ltd. (United Kingdom)	100
Albright & Wilson A.B. (Sweden)	100
Albright & Wilson A/S (Norway)	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom)	100
Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom)	100
Albright & Wilson GmbH (Austria)	100
Albright & Wilson Intertrade Ltd. (United Kingdom)	100
Albright & Wilson Investments (PTY), Ltd. (Australia)	100

Subsidiaries of Tenneco Inc. (continued)

Albright & Wilson (Australia) Ltd. (Australia)	57%
Gardinol Products (PTY), Ltd. (Australia)	100
National Brands (PTY), Ltd. (Australia)	100
Albright & Wilson (Langley) Ltd. (United Kingdom)	100
Albright & Wilson (Malaysia) SDN. BHD. (Malaysia)	100
Albright & Wilson (Marchon) Pte. Limited (Singapore)	100
Albright & Wilson (Marchon) Sdn Bhd (Malaysia)	100
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)	50
Albright & Wilson (Mfg.) Ltd. (United Kingdom)	100
Albright & Wilson Oils SDN BHD (Malaysia)	100
Albright Wilson Overseas Ltd. (United Kingdom)	100
Akulu Marchon (PTY) Ltd. (South Africa)	50
Akulu Chemicals (PTY) Ltd. (South Africa)	50

Subsidiaries of Tenneco Inc. (continued)

Marchon-Paragon Holdings (PTY) Ltd. (South Africa)	50%
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa) ..	50
Universal Chemical Contractors (PTY) (South Africa)	50
Albright & Wilson Aps (Denmark) ..	100
Albright & Wilson BV (Netherlands)	100
Albright & Wilson GmbH (Germany)	100
Albright & Wilson International Finance BV (Netherlands)	100
Albright & Wilson Ireland Ltd. (Eire)	100

Subsidiaries of Tenneco Inc. (continued)

Albright & Wilson Northern Ireland, Ltd. (United Kingdom)	100%
Ibex Ltd. (Ireland)	100
Thawpit (Ireland) Ltd. (Ireland)	100
Albright & Wilson SpA (Italy)	100
Leopack SpA (Italy)	100
Marchon Espanola S.A. (Spain)	100
Marchon France S.A. (France) .	100
Marchon Hellas Ltd. (Greece) .	100
Marchon Italiana SpA (Italy) ..	100
Marchon Sud SpA (Italy) ..	100
Polyphosphates Inc. (Philippines)	40
Albright & Wilson Pension Investment Ltd. (England)	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil)	100
Albright & Wilson Resins and Organics Limited (United Kingdom)	100

Subsidiaries of Tenneco, Inc. (continued)

Albright & Wilson (Sandwell) Ltd. (United Kingdom)	100%
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson (Warley) Ltd. (United Kingdom)	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia)..	100
Albright, Morarji and Pandit Limited (India)	39.9
Astoria Shipping & Transport Co., Ltd. (United Kingdom)	100
Cambray Ltd. (United Kingdom)	100
Clifford Christopherson & Co., Ltd., (United Kingdom)	100
Cumbria Trading Co., Ltd. (United Kingdom)	100
Detergent Chemical Limited (United Kingdom)	100
Electropol Ltd. (United Kingdom)	100
General Phosphates Co. (England)	100
Leo Lines, Ltd. (United Kingdom)	100

Subsidiaries of Tenneco Inc. (continued)

Mallison Feeds, Ltd. (United Kingdom)	100%
Marchon Products, Ltd. (United Kingdom)	100
Mays Chemical Manure Co., Ltd. (United Kingdom)	100
Mortimer Investment Co. Limited (United Kingdom)	100
Proban Ltd. (United Kingdom)	100
Solway Chemicals, Ltd. (United Kingdom)	100
Stockport United Chemical Co. Ltd. (United Kingdom)	100
Tenneco Malros Ltd. (United Kingdom)	100
Tenneco Organics Ltd. (United Kingdom)	100
Arndale Fuels Ltd. (United Kingdom) .	50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)	
Bracey Petroleum Products Ltd. (United Kingdom)	50
Butler Oil Products Ltd. (United Kingdom)	50

Subsidiaries of Tenneco Inc. (continued)

(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)	
Elston Oils Limited (United Kingdom) ...	100%
John Oils Limited (United Kingdom)	100
Compass Chemical Company, Ltd. (United Kingdom)	100
The Scottish Chemical Co., Ltd. (United Kingdom).	100
Thomas Tyrer & Co. Ltd. (United Kingdom)	100
Case-Poclain Limited (United Kingdom)	100
David Brown Tractors Limited (United Kingdom)	100
David Brown Tractors (Belfast) Ltd. (United Kingdom)	100
David Brown Tractors (Ireland) Ltd. (Ireland)	100
David Brown Tractors (Retail) Ltd. (United Kingdom)	100
A. M. Exports, Ltd. (United Kingdom)	100
Poclain Limited (United Kingdom)	100

Subsidiaries of Tenneco Inc. (continued)

Tractorwork, Ltd. (United Kingdom)	100%
Eastern Insurance Company (U.K.) Limited (United Kingdom)	100
Globe Petroleum Sales Limited (United Kingdom)	100
Golden Oil Products, Ltd. (United Kingdom)	100
Harmo Industries, Ltd. (United Kingdom)	100
Birmingham Filters Ltd. (United Kingdom)	100
Brames Ltd. (United Kingdom)	100
D. P. Miller & Sons Ltd. (United Kingdom)	100
Harmo Pressings Ltd. (United Kingdom) ...	100
Harmo Steel Co. Ltd. (United Kingdom) ...	100
Harmo Tubes Ltd. (United Kingdom) ...	100
F. Mould Ltd. (United Kingdom)	100
F. Mould (Silencers) Ltd. (United Kingdom)	100
J. W. Hartley (Motor Trade) Ltd. (United Kingdom)	100
Fisher & Mould Ltd. (United Kingdom) ...	100

Subsidiaries of Tenneco Inc. (continued)

Harmo Auto Services (Export) Ltd. (United Kingdom) ...	100%
Harmo Auto Services Ltd. (United Kingdom) ...	100
Harmo Export Ltd. (United Kingdom) ...	100
Harmo Filters Ltd. (United Kingdom) ...	100
Harmo Technical Development Ltd. (United Kingdom) ...	100
Steering & Suspension Ltd. (United Kingdom) ...	100
Karobes Ltd. (United Kingdom)	100
Midland Trim & Equipment Ltd. (United Kingdom)	
The Linford Engineering Co. Ltd. (United Kingdom)	100
Houston Data Venture (U.K.) Limited (United Kingdom).	100
J. I. Case Company Ltd. (United Kingdom)	100
LaTerre Petroleum (U.K.), Limited (United Kingdom).	100

Subsidiaries of Tenneco Inc. (continued)

Monroe Auto Equipment U.K. Limited (United Kingdom)	100%
Pit Stop Auto Services Limited (United Kingdom)	100
Tees Storage Limited (United Kingdom)	50
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco-Walker (U.K.) Limited (United Kingdom)	100
Tenneco United Kingdom, Inc. (Delaware)	100
Tenneco Venezuela, Inc. (Delaware)	100
Tenneco Walker B. V. (Netherlands)	100
TOL-Transicol Chemie GmbH (West Germany)	100
Universaltrac Beteiligungs GmbH (Germany)	100
Intertractor Viehmann GmbH & Co. (Germany)	50
Intertrac A.G. (Switzerland)	100
Intertrac America Corporation (Delaware)	100
Intertrac G.B. Ltd. (United Kingdom)	100
Intertrac Italiana S.R.L. (Italy)	100
Walker Norge A/S (Norway)	100
W. H. Wylie & Co. Pty. Limited (Australia)	100
Tenneco LNG Inc. (Delaware)	100
Tenneco Norway LNG Inc. (Delaware)	100
Tenneco Power Systems, Inc. (Delaware)	100
Tenneco Realty, Inc. (Delaware)	100
First National Services, Inc. (Delaware)	100
Inmobiliaria Belgrado, S.A. (Mexico)	100

Subsidiaries of Tenneco Inc. (continued)

Ten Ten Travis Corporation (Delaware)	100%
Tennchase, Inc. (Texas)	100
Tenneco Realty Development Corporation (Delaware)	100
Meadows of the Kern Mutual Water Company (California)	100
Stockdale Coffee Company (California)	100
Stoco Mutual Water and Sewer Company (California)	70
Tenneco Property Corporation (California)	100
Uplands of the Kern Mutual Water Company (California)	100
Tennessee Gas Building Corporation (Delaware)	100
TRI Realty, Inc. (Texas)	100
Tenneco Trinidad LNG, Inc. (Delaware)	100
Tenneco Ventures Inc. (Delaware)	100
Tennessee Gas Marketing Company (Delaware)	100
Tennessee Gas Services, Inc. (Delaware)	100
Tennessee Gas Transmission Company (Delaware)	100
Tennessee Iroquois Gas Company (Delaware)	100
Tennessee Niagara Gas Company (Delaware)	100
Tennessee Ozark Gas Company (Delaware)	100
Tennessee Storage Company (Delaware)	100
Tennessee Trailblazer Gas Company (Delaware)	100
Tennessee Trans-Anadarko Gas Co. (Delaware)	100
THC Pipeline Company (Delaware)	100
Walker Manufacturing Company (Delaware)	100
Walker Marketing Corporation (Wisconsin)	100

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1349

In The
Supreme Court of the United States
October Term, 1985

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, et al.,
Respondents.

NONFEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Donald D. MacIntyre*
Tim D. Hall
Special Assistants Attorney General
Montana Department of Natural Resources and Conservation
1520 East Sixth Avenue
Helena, Montana 59620
(406) 444-6699
Counsel for Montana Respondents

A.G. McClintock, Attorney General*
Jennifer Hager
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7818
Counsel for Wyoming Respondents

Nicholas J. Spaeth, Attorney General*
Rosellen M. Sand
Charles M. Carvell
Assistants Attorney General
900 East Boulevard
State Office Building
Bismarck, North Dakota 58505
(701) 224-2210
Counsel for North Dakota Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether Congress in passing an Act of Consent to an interstate compact that contains a provision that might otherwise impermissibly burden commerce has immunized the provision from Commerce Clause objection?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REASONS WHY THE WRIT SHOULD BE DENIED:

I. Review Should Be Denied Because the Ninth Circuit's Holding that the Yellowstone River Compact is a Federal Law Immune from Commerce Clause Attack is Correct. 2

II. Review Should Be Denied Because the Decision of the Ninth Circuit Does Not Create An Intolerable Conflict Among the Nation's Federal Appellate Courts. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Pages

CASES:

Cuyler v. Adams, 449 U.S. 433 (1981) 2, 7, 8

Hughes v. Oklahoma, 441 U.S. 322 (1979) 10

Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983) 11

Intake Water Co. v. Yellowstone River Compact Commission, 590 F.Supp. 293 (D.Mont. 1983) 2

Intake Water Co. v. Yellowstone River Compact Commission, 769 F.2d 568 (9th Cir. 1985) 2, 4

Lewis v. BT Investment Managers, Inc., 447 U.S. 17 (1980) 5

Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System, — U.S. —, 105 S.Ct. 2545 (1985) 7

NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission New York Harbor, 732 F.2d 191 (2d Cir.), — U.S. —, 105 S.Ct. 175, 83 L.Ed. 2d 109 (1984) 7

Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (1852) 8

Philadelphia v. New Jersey, 437 U.S. 1017 (1983) 10

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 3, 9

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 4, 5, 9, 10, 11

Texas v. New Mexico, 462 U.S. 554 (1983) 8

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 11

TABLE OF AUTHORITIES—Continued

	Pages
STATUTES:	
97 CONG. REC. 13733 (Oct. 20, 1951)	3
MONT. CODE ANN. §§ 85-2-801 to 807 (1985)	11
MONT. CODE ANN. § 85-20-101 (1985)	2
N.D. CENT. CODE § 61-02-14 (1960)	11
N.D. CENT CODE § 61-23-01 (1960)	2
WYO. STAT. § 41-12-601 (1977)	2
WYO. STAT. § 41-12-603-607	11
47 Stat. 306 (1932)	5
50 Stat. 551 (1937)	5
54 Stat. 399 (1940)	6
Pub.L.No. 83, 63 Stat. 152 (1949)	6
Pub.L.No. 231, ch. 629, 65 Stat. 663 (1951)	2, 6, 8
65 Stat. 664, Art. II (1951)	4
67 Stat. 541 (1953)	8
29 U.S.C. § 1144(a)	8

No. 85-1349

In The

Supreme Court of the United States

October Term, 1985

INTAKE WATER COMPANY,

Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, et al.,

Respondents.

NONFEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NONFEDERAL RESPONDENTS' BRIEF IN OPPOSITION

The Nonfederal Respondents, the individual members of the Yellowstone River Compact Commission, the Montana Attorney General, the State Engineer of North Dakota, and the North Dakota Water Commission, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit Court of Appeals' opinion in this case. The opinion is reported at 769 F.2d 568.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Review Should Be Denied Because The Ninth Circuit's Holding That The Yellowstone River Compact Is A Federal Law Immune From Commerce Clause Attack Is Correct.

The three-judge District Court in *Intake Water Co. v. The Yellowstone River Compact Commission*, 590 F. Supp. 293 (D.Mont. 1983) and the Ninth Circuit Court in *Intake Water Co. v. Yellowstone River Compact Commission*, 769 F.2d 568 (9th Cir. 1985) correctly found and applied the rule of law set forth by this Court in *Cuyler v. Adams*, 449 U.S. 443 (1981). In adopting the reasoning of the three-judge panel the Ninth Circuit held that when Congress approved the Yellowstone River Compact, Act of Consent to the Yellowstone River Compact, Pub.L. No. 231, ch. 629, 65 Stat. 663 (1951)[1], Congress was acting within its authority to immunize state law from some constitutional objections[2] by converting it to federal law. *Intake Water Co.* at 570. One such constitutional objection that may not be raised is the Commerce Clause objection. *Id.*

---

1 The signatory states, Montana, Wyoming, and North Dakota, approved the Compact prior to congressional ratification. The Compact is codified in state statutes: MONT. CODE ANN. § 85-20-101 (1985); WYO. STAT. § 41-12-601 (1977); N.D. CENT. CODE § 61-23-01 (1960).

2 Compacts remain part of the law of the compacting states and the states act "under color of state law" when fundamental constitutional rights are involved and alleged to be violated. This is so since Congress does not have the power to abridge or to authorize the states to abridge fourth, fifth and fourteenth amendment rights.

The Ninth Circuit Court's cogent reasoning is as follows:

1.a. The Yellowstone River Compact was approved by an express act of Congress, signed into law by the President of the United States.[3]

b. When Congress approved the Yellowstone River Compact it transformed it into a law of the United States.

c. Federal legislation is not subject to the restrictions that the Commerce Clause imposes on state laws affecting commerce.[4]

2. The requirement necessary for Commerce Clause immunization is that Congress expressly state its authorization to immunize state law from Commerce Clause objection.

3. Article X of the Compact was before Congress and Congress expressly approved it.

4. A court may not rewrite a congressionally approved compact.[5]

---

[3] The Yellowstone River Compact was passed by the House of Representatives and the Senate and was signed by President Truman. 97 CONG. REC. 13733 (Oct. 20, 1951).

[4] *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

[5] As noted by District Judge Tashima, sitting by designation, in his concurring opinion:

> Congress has "expressly reserved" in the Act of Consent the "right to alter, amend or repeal" its consent

(Continued on following page)

The Commerce Clause objection raised by Petitioner (hereinafter Intake) springs from Article X of the Yellowstone River Compact, which reads in part:

> No water may be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states [Montana, Wyoming, North Dakota] . . . .

Intake argues that Article X burdens commerce outside the Yellowstone River Basin.[6] The reasoning of the court of appeal's judgment renders Intake's argument untenable. Article X of the Yellowstone River Compact is immune from Commerce Clause attack. Consequently, Intake's challenge to the validity of Article X on the basis that it discriminates against, unreasonably impedes and exerts an undue burden on the flow of interstate commerce in violation of the Commerce Clause fails under any fact situation.

As a result of *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), it is settled that the dormant Commerce Clause would prohibit a state from unilaterally es-

---

(Continued from previous page)

> to Compact. Pub. L. No. 231 § 2, 65 Stat. 663, 671 (1951). From this we may infer two things. First, that Congress reserved all that it intended to reserve when it approved the Compact. And, second, that Congress may, at any time, change its mind and withdraw Commerce Clause immunity.

Intake Water Co. v. Yellowstone River Compact Commission, 769 F.2d 568, 571 n. 3 (1985) (Tashima, D.J., concurring).

[6] The Yellowstone River Basin is the area of Montana, North Dakota and Wyoming that is drained by the Yellowstone River and its tributaries and includes the area in Montana known as Lake Basin but excludes those lands lying within Yellowstone National Park. Yellowstone River Compact, 65 Stat. 664, Art. II (1951).

tablishing a water allocation system within the state by excluding water users from outside the state unless the restriction serves the state's legitimate water interests. However, with a narrow tailoring Montana, North Dakota and Wyoming may join together to establish a regional allocation system, i.e., in the Yellowstone River Basin, that prohibits or restricts allocations among users outside the Basin without offending against the rule enunciated in *Sporhase*. But to do so without congressional approval may create Commerce Clause objections. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

This case involves a congressionally approved interstate agreement. Historically, both Congress and the United States Supreme Court have encouraged interstate cooperation and the resolution of interstate conflicts, such as with water allocation, through the use of this special instrument called an interstate compact. The Yellowstone River Compact is an example of a compact resulting from years of serious negotiations and cooperation between the compacting states and the federal government over the waters of the Yellowstone River Basin.[7] In 1949 Congress

---

[7] The Yellowstone River Compact is the result of many years of negotiations to reach agreement on the allocation and use of the waters of the Yellowstone River. The consent of Congress to first compact was granted by Act of June 14, 1932, ch. 253, 47 Stat. 306 (1932). Subsequently, an agreement was entered on February 6, 1935, between the Wyoming and Montana Commissioners, but neither state legislature acted upon the agreement. By Act of August 2, 1937, ch. 552, 50 Stat. 551 (1937), Congress again granted its approval to negotiate a compact between Montana and Wyoming. Because of a lack of data no compact was resolved

(Continued on following page)

gave its consent to Montana, North Dakota, and Wyoming to negotiate a compact by not later than June 1, 1952. Pub. L. No. 83, 63 Stat. 152 (1949). The compact was to provide for an equitable division and apportionment of the water supply of the Yellowstone River between the three compacting states. Congress provided that a representative of the United States participate in the negotiations and to report to the Congress on the negotiations and any compact entered into by the compacting states. *Id.* at 153. The necessity for a federal representative and a subsequent status report to Congress followed from Congress' instruction to the states that any compact entered into would not be binding upon any party unless approved by each state legislature and by Congress. *Id.* at 152. Having successfully negotiated and approved the Yellowstone River Compact the states placed the Compact before Congress for its express action pursuant to the congressional directive in Public Law No. 83. Congress affirmatively responded with the Act of Consent to the Yellowstone River Compact, Pub.L. No. 231, ch. 629, 65 Stat. 663 (1951).

Clearly, the commerce power of Congress is not dormant in this case. It was exercised by Congress in 1951 when it enacted the Act of Consent to the Yellowstone

---

(Continued from previous page)

but a recommendation was made by the Commissioners that North Dakota be involved in future negotiations. Congressional consent to an extension of time within which to negotiate a compact between the three basin states was given in 1940. Act of June 15, 1940, ch. 372, 54 Stat. 399 (1940). A resultant compact was signed in 1942 but the Wyoming Legislature failed to ratify it. This was followed by a third compact, ratified by the legislatures of all three states, but vetoed by the Governor of Wyoming. The final series of negotiations that ultimately led to the Yellowstone River Compact commenced in 1949.

River Compact. Congress had Article X before it and expressly approved it by its act of consent. And when Congress so chooses, state actions which Congress plainly authorizes are invulnerable to commerce clause objections. *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System,* — U.S. —, 105 S.Ct. 2545, 86 L.Ed.2d 122 (1985).

As to whether Congress was acting within its authority to immunize state law from some constitutional objection by converting it into federal law when it acted in giving consent to the Yellowstone River Compact, this Court need only look to its holdings in *Cuyler v. Adams, supra,* and *Texas v. New Mexico,* 462 U.S. 554 (1983).

In *Cuyler* it was held that an Interstate Agreement on Detainers was a substantive federal law because congressional consent transformed the interstate compact into a law of the United States:

> Because congressional consent transforms an interstate compact within this clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question.
>
> 449 U.S. at 438.

Cuyler was cited as authoritative in *NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission New York Harbor,* 732 F.2d 191 (2d Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 175, 83 L.Ed.2d 109 (1984). There, New Jersey and New York entered a compact with the consent of Con-

gress[8] dealing with the improvement of labor conditions in the port of New York area. The issue raised was whether the compact was preempted by the Employee Retirement Income Security Act (ERISA). The Second Circuit Court relying on *Cuyler* held that the consent of Congress transformed the compact into federal law and therefore it was not preempted by ERISA.[9] The rule of *Cuyler* is clear: congressional consent of an interstate compact transforms it into a law of the United States—a federal law.

The United States Supreme Court holding in *Texas v. New Mexico* is similarly instructive. There, this Court talked about the metamorphosis involved in congressional consent of interstate compacts:

> Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "congressional consent transforms an interstate compact within this Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); see *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1852). One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow

---

[8] Act of Aug. 12, 1953, Pub. L. No. 83-252, 67 Stat. 541 (1953). The purpose of the Act was " . . . to grant congressional consent, pursuant to the Federal Constitution, to an interstate compact between the States of New York and New Jersey setting up a bi-state agency to improve waterfront labor conditions in the port of New York area." A similar express enactment of Congress was evidenced by the Act of Consent to the Yellowstone River Compact, 65 Stat. 663, ch. 629, Pub. L. 231 (1951).

[9] Section 514(d), 29 U.S.C. § 1144(a), of ERISA provides that the provisions of ERISA do not preempt any federal statutes.

> unconstitutional, no court may order relief inconsistent with its express terms.
>
> 462 U.S. at 564.

The metamorphosis allows the federal courts to scrutinize the Compact for unconstitutional abridgement of fundamental constitutional rights, such as those protected by the fourth, fifth, and fourteenth amendments. This is to say that a congressionally approved compact is subject to the same constitutional analysis as is any federal statute, and by definition a federal statute is not subject to scrutiny under the Commerce Clause. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

Finally, the Yellowstone River Compact is an enactment of Congress. All segments of the country were represented and a collective decision was made through the action of Congress. No clearer expression of approval by Congress can be made than by enactment of the statute itself and in the case at issue by the enactment of the Yellowstone River Compact. The signatory states and Congress have enacted precisely the same statute. This case is unlike the *Sporhase* type cases wherein there is a unilateral imposition of an unreasonable burden on interstate commerce. Here there is no unilateral action; Congress and the States have acted in concert in effectuating the Compact. The Yellowstone River Compact is an outstanding example of interstate cooperation. The Compact's provisions were carefully drafted through arduous negotiations and thereafter expressly approved by Congress and the compacting states. Since the Yellowstone River Compact has been expressly consented to by Congress it is a federal law for purposes of Commerce Clause objections and is immune from attack.

II. Review Should Be Denied Because The Decision Of The Ninth Circuit Does Not Create An Intolerable Conflict Among The Nation's Federal Appellate Courts.

This is simply not a case warranting the exercise of this Court's certiorari jurisdiction because the Ninth Circuit's decision does not create an intolerable conflict among the nation's federal appellate courts.

Intake cites to no intolerable conflict. Rather, Intake argues that review is necessary to protect federal commerce interests and to reconcile a perceived conflict between Commerce Clause and Compact Clause precedents. But the facts are that no intolerable conflict exists among the nation's appellate courts on the question presented.

Nonfederal Respondents acknowledge that water is an article of commerce subject to congressional regulation. *Sporhase v. Nebraska ex rel. Douglas, supra.* The Nonfederal Respondents do not rely herein on the assumption that the signatory states have an ownership right to exclude others from Yellowstone River water. It is recognized that without the consent of Congress a state, either on its own or in combination with other states, may not impose burdens on interstate commerce in water unless the restrictions are tailored to serve the state's legitimate water interests. *Id.* Consequently, Intake's reliance on case law[10] supporting the proposition that the Commerce

---

[10] Petition for a Writ of Certiorari, note 7 at pages 8-9 cites to: *Hughes v. Oklahoma,* 441 U.S. at 326-355 (state regulation of wildlife must conform to the Commerce Clause); *Philadelphia v. New Jersey,* 437 U.S. 617, 625-628 (1978)

(Continued on following page)

Clause restricts exclusive state ownership of resources identifies no conflict between the parties to this case nor among the nation's lower courts on the issue before the Court. Unlike any case cited by Intake, Congress has explicitly approved the "barrier to interstate commerce"[11] in approving the Yellowstone River Compact.

Regardless of the language Intake chooses to couch its assertions of conflict, the issue for which review is requested is whether when Congress approves a compact it converts the provisions of the compact into federal law

---

(Continued from previous page)

(interstate access to solid waste disposal capacity in New Jersey may not be prohibited in order to preserve the State's environmental resources); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) (states may not preserve solely for its own inhabitants natural resources located within its borders); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 951, 956 (1982) (water is an article of commerce, and Nebraska may not ban its export based upon a lack of reciprocity); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (Oklahoma may not prohibit the interstate transfer of natural gas). None of the cited cases address the issue before the Court as to whether when Congress passes an Act of Consent to a compact it gives the consent necessary to immunize the subject legislation from Commerce Clause attack.

[11] Petitioner argues the language of Article X of the Yellowstone River Compact that "[n]o waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states" is an absolute ban. Article X does not provide that water may not be diverted out of the Basin. It simply provides for the consent of the States of Montana, North Dakota and Wyoming prior to the out-of-basin transfer. A facial examination of Article X and the implementing state statutes, which are not challenged herein, reveals that the state laws provide for and allow the exportation of water from the Basin. MONT. CODE ANN. §§ 85-2-801 to 807 (1985); N.D. CENT. CODE § 61-02-14 (1960); WYO. STAT. §§ 41-12-603 to 607.

sufficient to immunize the compact from Commerce Clause objection. Intake acknowledges that the Compact has received congressional approval but argues that absent specific indications to the contrary, congressional consent does not operate as a blanket approval for state actions under a compact which would otherwise violate Commerce Clause restrictions. The uniqueness of Intake's argument is summed up in the concurring opinion of the Ninth Circuit Court:

> While arguing strenuously that its position is supported by case law, Intake acknowledges that it advances a novel proposition (i.e., that, in terms of the issue it tenders, this is a case of a first impression). None of the many cases cited by Intake squarely support its contention.
>
> 769 F.2d at 570-71 (Tashima. D.J., concurring).

The novelty of Intake's position is reaffirmed in its Petition, wherein it is stated:

> The instant case thus presents the *first opportunity* for this Court to provide guidance on the *unexplored*—and increasingly significant—linkage between the congressional commerce power and the constitutional requirement that Congress approve certain interstate agreements.
>
> *Pet.*, p. 13. (emphasis added).

The issue raised by Intake has not been presented in prior cases in this Court. Nor has the precise issue been presented to any other Circuit Court of Appeals. Consequently, there is no conflict, much less an intolerable conflict, among the nation's federal appellate courts. The question raised does not deserve this Court's discretionary review.

CONCLUSION

The issue raised by Intake is not reflective of any intolerable conflict among the nation's federal appellate courts. It is a novel issue which does not deserve discretionary review. Regardless of the uniqueness of the issue, the Ninth Circuit Court decision is correct as a matter of law. The Yellowstone River Compact as expressly approved by Congress is immune from Commerce Clause attack.

The petition for certiorari should be denied.

Respectfully submitted,

DONALD D. MACINTYRE*
TIM D. HALL
Special Assistants Attorney General
Montana Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, Montana 59620
(406) 444-6699

Counsel for Montana Respondents

A.G. McCLINTOCK, Attorney General*
JENNIFER HAGER
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7818

Counsel for Wyoming Respondents

NICHOLAS J. SPAETH, Attorney
General*
ROSELLEN M. SAND
CHARLES M. CARVELL
Assistant Attorneys General
900 East Boulevard
State Office Building
Bismarck, North Dakota 58505
(701) 224-2210

*Counsel for North Dakota
Respondents*

*Counsel of Record

(4)

No. 85-1349

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTAKE WATER COMPANY, PETITIONER

v.

YELLOWSTONE RIVER COMPACT COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

JACQUES B. GELIN
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

14pp

QUESTION PRESENTED

Whether the Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 *et seq.*, which ratified the Yellowstone River Compact between the States of Montana, North Dakota, and Wyoming, provides the necessary congressional consent to shield a provision of the Compact from attack under the Commerce Clause.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Adams*, 449 U.S. 433 ..... 6, 7

Idaho ex rel. Evans v. *Oregon*, 462 U.S. 1017 8

New England Power Co. v. *New Hampshire*, 455 U.S. 331 5

Northeast Bancorp, Inc. v. *Board of Governors of the Federal Reserve System*, No. 84-363 (June 10, 1985) 4, 5

South-Central Timber Development, Inc v. *Wunnicke*, No. 82-1608 (May 22, 1984) 5

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 4

Sporhase v. *Nebraska ex rel. Douglas*, 458 U.S. 941 5

Texas v. *New Mexico*, 462 U.S. 554 7

Washington Metropolitan Area Transit Authority v. *One Parcel of Land*, 706 F.2d 1312, cert. denied, 464 U.S. 893 7

Page

Cases—Continued:

Western & Southern Life Ins. Co. v. *State Board of Equalization*, 451 U.S. 648 ..... 4, 5

White v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 5

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 3, 4, 6, 7

Act of Apr. 8, 1918, ch. 47, 40 Stat. 515 8

Act of June 2, 1949, ch. 166, 63 Stat. 152-153 8

Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 *et seq.* 2, 5, 6

§ 1, 65 Stat. 663 5

Art. III, 65 STat. 665 2

Art. X, 65 Stat. 669 ..... 2, 5, 6, 7

§ 2, 65 Stat. 671 5

Pub. L. No. 94-381, 90 Stat. 1119 *et seq.* 3

28 U.S.C. (1970 ed.) 2281 3

42 U.S.C. 1304 7

Miscellaneous:

97 Cong. Rec. 13733 (1951) 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1349

INTAKE WATER COMPANY, PETITIONER

v.

YELLOWSTONE RIVER COMPACT COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 769 F.2d 568. The opinion of the three-judge district court (Pet. App. 7a-18a) is reported at 590 F. Supp. 293.

JURISDICTION

The judgment of the three-judge district court was entered on October 25, 1983. The judgment of the court of appeals was entered on August 20, 1985; a petition for rehearing was denied on November 15, 1985. The petition for a writ of certiorari was filed on February 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1]After the district court entered its judgment, petitioner was uncertain whether to appeal to the court of appeals or to appeal directly to this Court under 28 U.S.C. 1253; petitioner therefore filed a protective

STATEMENT

1. On October 30, 1951, Congress granted its consent to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the use of waters from the Yellowstone River (ch. 629, 65 Stat. 663 *et seq.*). See Pet. App. 22a-38a. Article X of the Yellowstone River Compact (the Compact) provides in pertinent part that "[n]o water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." 65 Stat. 669; Pet. App. 34a.

In 1973, petitioner devised a plan to divert appropriated waters from the Yellowstone River to points outside the Yellowstone River Basin (Pet. App. 3a). Unable to secure the consent of Montana, one of the three Compact states, to its proposed diversion (see *id.* at 9a n.2), petitioner filed the present action in the United States District Court for the District of Montana.[2] Among other things, petitioner contended that Article X of the Compact constitutes an unconstitutional burden on interstate commerce because it requires the consent of three states before an interbasin water transfer is allowed (see Pet. App. 10a-11a).

---

jurisdictional statement in this Court on July 24, 1984. On October 29, 1984, this Court dismissed the appeal for lack of jurisdiction (No. 84-131). See Pet. App. 21a.

[2]Petitioner named as defendants the Yellowstone River Compact Commission, the individual members of the Commission, the Attorney General of the State of Montana, the State Engineer of the State of North Dakota, and the North Dakota State Water Commission. Article III of the Compact provides that one representative on the Commission shall be selected by the Director of the United States Geological Survey and shall act as Chairman of the Commission without voting privileges except in specified instances. 65 Stat. 665.

2. Petitioner's claim was rejected by a three-judge district court (Pet. App. 7a-18a).[3] The court explained (Pet. App. 12a):

> [D]efendants [respondents in this Court] rely on the following argument: The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. We find this argument compelling. When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law.

The court added that there was no doubt in this case that Congress meant to endorse the challenged restrictions on interstate commerce, because "the Compact was before Congress and Congress voted to approve it" (Pet. App. 13a). The court therefore found distinguishable cases in which Congress had failed to expressly immunize state legislation from the reach of the Commerce Clause (*id.* at 13a-14a).[4]

---

[3]At the time this case was filed, a three-judge district court was required to hear any suit in which an injunction restraining the enforcement of a state statute was sought on federal constitutional grounds. 28 U.S.C. (1970 ed.) 2281. This requirement was repealed prospectively in 1976. See Pub. L. No. 94-381, 90 Stat. 1119 *et seq.*

[4]The district court also rejected petitioner's claims that the Compact denied it equal protection (Pet. App. 14a-16a) and that petitioner's proposed diversion was outside the regulatory purview of the Compact (*id.* at 16a-18a). Those rulings are not at issue here.

The court of appeals affirmed (Pet. App. 1a-6a), accepting the reasoning of the district court (*id.* at 4a). The court of appeals agreed that there could be no "question as to whether Congress in fact approved the state law [for] which immunity from Commerce Clause attack is claimed: The Compact was before Congress and Congress expressly approved it" (*ibid.*). And the court found additional support (*id.* at 4a-5a) for its decision in *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-363 (June 10, 1985), which, it noted, held that " '[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.' " Pet. App. 5a (quoting *Northeast Bancorp*, slip op. 14).[5]

ARGUMENT

1. It is common ground that Congress, acting pursuant to the Commerce Clause's affirmative grant of authority, "[may] redefine the distribution of power over interstate commerce" by permitting the states "to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). Thus, if Congress "ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 651-652 (1981). It is equally

---

[5]Judge Tashima concurred, specifically rejecting petitioner's assertion that it should be inferred from the "essentially silent congressional record" (Pet. App. 6a) that Congress, in approving the Compact, did not intend to shield it from Commerce Clause objections. By rejecting petitioner's argument, Judge Tashima explained, the court "merely ascribe[d] to Congress the intent plainly to be inferred from its action, *i.e.*, that it intended to do what it did—approve the Yellowstone River Compact without reservation" (*ibid.* (footnote omitted)).

clear, however, that congressional authorization of otherwise invalid state legislation must be expressly stated. See generally *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-363 (June 10, 1985), slip op. 13-14; *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 5-10; *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 215 (1983); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *Western & Southern*, 451 U.S. at 654.

The "dispositive question" in this case, then, "is whether Congress in fact has authorized the states to impose [the] restrictions * * * at issue * * *." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). And that question is unequivocally answered by the Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 *et seq.*, which states in Section 1 that "the consent of the Congress is hereby given to [the Yellowstone River Compact]" (65 Stat. 663). Section 1 of the Act also sets out the provisions of the Compact, while Section 2 expressly reserves the right of Congress "to alter, amend or repeal [S]ection 1 * * *." 65 Stat. 671. It is thus plain on the face of the law that Congress "affirmatively contemplate[d]" the restrictions on water use authorized by the Yellowstone River Compact; by approving Article X of the Compact, Congress made "unmistakably clear" its intent to authorize the signatory states to foreclose the diversion of water from the Yellowstone River Basin. *South-Central Timber Development, Inc.* v. *Wunnicke*, slip op. 9.

In applying the law as written, the court of appeals accordingly did not, as petitioner repeatedly asserts (Pet. 7, 11, 17-18), depart from the principle that Congress must act expressly when it authorizes the states to impede the flow of commerce. Instead, the court simply held that Congress *had* expressly authorized state involvement in the regulation of

interstate commerce by giving its consent to Article X of the Compact, which provides that "[n]o water shall be diverted * * * without the unanimous consent of all the signatory States" (65 Stat. 669). Indeed, given the explicit language of the Compact, the court could hardly have held otherwise. Similarly, petitioner's suggestion that the court of appeals improperly awarded the signatory states "all powers over interstate commerce that can possibly be read into the Compact" (Pet. 18) entirely ignores the language of Article X: the state of Montana, in withholding its consent to the diversion of water, did nothing more than it explicitly was permitted to do by Congress.

2. Petitioner does not deny that Congress has given its consent to Article X of the Yellowstone River Compact; for that matter, petitioner evidently acknowledges (Pet. 3, 13-14) that Congress enacted the Compact into federal law. Petitioner nevertheless insists (Pet. 13-17) that the Compact is not a federal law "for all purposes" (Pet. 14 (footnote omitted)).[6] But it entirely fails to explain why this should be so. While petitioner notes (Pet. 15-17) that Congress may approve a Compact by means other than an act of consent, that observation is irrelevant here[7]: consent to the Yellowstone River Compact—and the Compact itself—was passed by both Houses of Congress, signed into law by the President (see 97 Cong. Rec. 13733 (1951)), and printed in the United States Statutes at Large (65 Stat. 663 *et seq.*). For

---

[6]Even if the Compact somehow were deemed not to be a federal law, petitioner offers no reason to believe that Congress's explicit consent to the Compact—which concededly was given—is insufficient to shield state actions taken pursuant to the Compact from Commerce Clause attack.

[7]In fact, even where congressional consent is conferred by means other than legislation specifically approving a given compact, that consent converts the compact into federal law. See *Cuyler* v. *Adams*, 449 U.S. 433, 441-442 (1981).

the same reason, petitioner's comments about compacts that were "never subjected to the normal congressional legislative process" (Pet. 17) simply have no application here.[8] And petitioner's suggestion that a compact approved by Congress should be deemed to be a federal law only for purposes of providing federal court jurisdiction (Pet. 13) cannot be reconciled with the decisions of this Court. See *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler* v. *Adams*, 449 U.S. 433, 438-439 n.7 (1981); *Washington Metropolitan Area Transit Authority* v. *One Parcel of Land*, 706 F.2d 1312, 1318-1319 (4th Cir.), cert. denied, 464 U.S. 893 (1983).[9]

3. Petitioner's narrower argument that Congress did not in fact intend to shield Article X of the Compact from Commerce Clause objections (Pet. 10-13) similarly founders on the statutory language. In providing that no water may be removed from the Yellowstone River Basin without the consent of the signatory states, Congress obviously

---

[8]Petitioner's sole evidence for the proposition that the Compact is not an ordinary federal law is the fact that Congress expressly reserved the right to alter, amend, or repeal the Act of Oct. 30, 1951 (Pet. 17). But Congress often explicitly reserves its right to repeal legislation to make clear its intention not to create vested rights. See, *e.g.*, 42 U.S.C. 1304.

[9]In making this suggestion, petitioner cites (Pet. 13) *Cuyler*, where the Court held that the Interstate Agreement on Detainers is "an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction" (449 U.S. at 438). The Court reasoned in *Cuyler* that, "[b]ecause congressional consent transforms an interstate compact within [the Compact Clause] into a law of the United States, * * * the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question" (*ibid.*). This reasoning plainly provides petitioner with no support: the Court held that interpretation of a compact presents a federal question because congressional consent converts the compact into federal law.

contemplated that those states might withhold their consent.[10]

There is no doubt, moreover, that Congress knew what it was doing when it approved the Compact. In 1949, Congress authorized the signatory states to enter into a compact regarding the division and apportionment of the waters of the Yellowstone River,[11] with the proviso that none of the parties would be bound by the compact unless and until it was approved by each state legislature and by Congress. Act of June 2, 1949, ch. 166, 63 Stat. 152-153. Congress further provided that a representative of the United States "shall participate in said negotiations * * * and shall make a report to Congress of proceedings and of any compact or agreement entered into * * *." *Ibid.* Congress was thus aware that its consent was necessary to give the negotiated compact the force of law. By granting its consent, Congress necessarily recognized that it was authorizing the states, through their representatives on the Compact Commission,

---

[10]The Yellowstone River Compact differs in this respect from the Oregon-Washington Columbia River Fish Compact at issue in *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017 (1983), upon which petitioner largely relies (Pet. 9-10). The latter compact simply provides that state laws "regulating, protecting, or preserving fish in the waters of the Columbia River * * * shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States." Act of Apr. 8, 1918, ch. 47, 40 Stat. 515. See *Idaho ex rel. Evans*, 462 U.S. at 1022. Nothing in that compact either directly impedes the flow of interstate commerce or suggests that the signatory states may take action impeding that flow. To the contrary, in approving the compact Congress provided that "[n]othing herein contained shall be construed to affect the right of the United States to regulate commerce." 40 Stat. 515.

[11]Act of June 2, 1949 (63 Stat. 152-153), states that "the consent of Congress is hereby given to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact, or agreement, not later than June 1, 1952, providing for an equitable division and apportionment between the States of the water supply of the Yellowstone River * * *."

to enforce the Compact. And, as the district court explained, "when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area" (Pet. App. 14a). The restrictions on commerce that are at issue here thus follow from a congressional exercise of the commerce power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

JACQUES B. GELIN
BLAKE A. WATSON
Attorneys

MAY 1986

DOJ-1986-05

MOTION FILED
MAR 12 1986

No. 85-1349

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE YELLOWSTONE RIVER PIPELINE CO., INC. AND THE WYOMING HERITAGE SOCIETY AS *AMICI CURIAE*

GEORGE A. ZUNKER *
JACK GAGE
WHITEHEAD, ZUNKER, GAGE, DAVIDSON & SHOTWELL, P.C.
Suite 300
504 W. 17th Street
Cheyenne, WY 82001
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

A part of Article X of the Yellowstone River Compact provides, "[n]o water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Based on that language, do any of the three signatory states—Montana, North Dakota or Wyoming—have a legal right to block an interstate transfer of water?

PARTIES TO THE PROCEEDINGS

Wyoming Heritage Society and the Yellowstone River Pipeline Co., Inc., *amici curiae*, adopt the statement of petitioner Intake Water Company as to "Parties to the Proceedings"; "Opinions Below"; "Jurisdiction;" "Pertinent Constitutional Provisions and Statutes"; and "Statement of the Case."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1349

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Yellowstone River Pipeline Company, a Wyoming Corporation, and the Wyoming Heritage Society hereby respectfully move the Court for leave to file the attached brief as *amici curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondents has not been obtained.

The interest of Yellowstone River Pipeline, Inc., in this case arises from a case pending in the Federal District Court for the District of Montana, Billings Division, entitled *Yellowstone River Pipeline Co. v. Montana Dep't of Natural Resources and Conservation*, No. CV-83-86-BLG (D. Mont.), where the issue of the interpretation of Article X of the Yellowstone River Compact is before the district court. Indeed, that court has stayed that case pending the outcome of this case.

The interest of the Wyoming Heritage Society lies in the serious negative impact that affirmance would have upon the prospects for future development of Wyoming's entitlement to its Yellowstone River Compact water allocation. More particularly, the Wyoming Heritage Society is concerned about the serious effect that affirmance would have upon development of Wyoming's huge coal resources, a true national asset that may otherwise go to waste.

In the instant case, petitioner argued before the Ninth Circuit that Article X of the Yellowstone River Compact was subject to challenge as an undue burden on interstate commerce. Since it is likely that petitioner may pursue the same argument in this Court, it is believed that the brief which the *amici curiae* would file would provide a more complete argument on this vital constitutional issue and would also present the view of other interested parties from a different jurisdiction. The undersigned *amici curiae* request that they be allowed to file the attached brief. When and if a writ of certiorari issues, they intend to file a brief in the principal case.

Respectfully submitted,

WYOMING HERITAGE SOCIETY AND
YELLOWSTONE RIVER PIPELINE
COMPANY, INC., *Amici Curiae*

GEORGE A. ZUNKER *
JACK GAGE
WHITEHEAD, ZUNKER, GAGE,
DAVIDSON & SHOTWELL, P.C.
504 W. 17th Street, Suite 300
Cheyenne, WY 82001
Counsel for Amici Curiae

* Counsel of Record

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
MOTION FOR LEAVE TO FILE	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE WRIT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	Page
City of Altus v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966)	3
Sporhase v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982)	3
Texas v. *New Mexico*, 462 U.S. 554 (1983)	3
West v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911)	3
Yellowstone River Pipeline Co. v. *Montana Dep't of Natural Resources and Conservation*, No. CV-83-86-BLG (D. Mont.)	2, 3
Compacts	
Yellowstone River Compact, 65 Stat. 663, art. X (1949)	2, 3
Other Authorities	
Speech by George Christopolus, Wyoming State Engineer, to Wyoming Water Development Association, Casper, Wyoming, November 16, 1981	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1349

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE YELLOWSTONE RIVER PIPELINE CO., INC. AND THE WYOMING HERITAGE SOCIETY AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

The Yellowstone River Pipeline Co., Inc. ("YRP") has a direct, tangible interest in the outcome of this case. The decision here will determine YRP's right to pursue a planned water project currently the subject of a suit in the federal district court for Montana. That suit raises the same basic issues challenged here and has been stayed pending the outcome of this proceeding.[1]

---

[1] *See* discussion below.

The Wyoming Heritage Society ("WHS") is an association that seeks the protection of Wyoming's values and its resources. Although these views are local and "homegrown", WHS believes that a failure to protect the right to use and develop the 2.2 million acre feet of water that flow out of Wyoming to the Gulf of Mexico will one day have disastrous effects on this state's ability to use and develop its coal resources. The efficient utilization of Wyoming's low-sulphur, relatively low-energy (9500 BTU per pound) coal requires water. Most of the coal is located outside the drainage basin of the Yellowstone River, and economics dictate that the water be moved to the coal. For these reasons WHS is concerned that the conclusion reached by the courts below will hamper resource development in Wyoming. Therefore, WHS believes a closer look at this case, and a reversal of the judgment below, will serve both Wyoming and the nation.

REASONS FOR GRANTING THE WRIT

This Court's ruling on the Commerce Clause challenge raised by petitioner Intake Water Company will also dispose of a similar challenge raised by *amicus curiae* YRP in a case currently pending before the United States District Court for the District of Montana. *Yellowstone River Pipeline Co.* v. *Montana Dep't of Natural Resources and Conservation*, No. CV-83-86-BLG (D. Mont.).[2] YRP faces the identical harm there that gave rise to suit in the instant case: unless this Court reverses the decision of the Court of Appeals, the state legislatures of Montana, North Dakota, and Wyoming can each permanently block the export of water across state lines relying only on Article X of the Yellowstone River Compact (the "Compact"), 65 Stat. 663, art. X.

---

[2] On March 16, 1984, Judge Batten stayed proceedings in that case pending the outcome of this case. App. 1a.

In *Yellowstone River Pipeline*, the plaintiff seeks to build a 108 inch diameter pipeline capable of exporting approximately 25,000 acre feet annually of Yellowstone River water from Montana to Wyoming. Much, if not all, of this water would be used to develop one of the nation's major energy resources: an estimated 20 billion tons of low sulphur coal found principally in the Fort Union Formation in Northeastern Wyoming.

In this case, neither the district court nor the court of appeals gave even cursory consideration to the implications of a legal rule that Article X of the Compact permits states to deny water for use in such future energy developments. A more thorough analysis of the reasons underlying the Compact negotiations and its subsequent approval by Congress will not support the kinds of restrictions on interstate water transfer that Wyoming, Montana, and North Dakota currently maintain.

It is simply undeniable that in numerous well-reasoned cases this Court has refused to allow individual states to lock up their resources. More specifically, this Court has told the western states that they may not lock up water. *Texas* v. *New Mexico*, 462 U.S. 554 (1983); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966). Moreover, it is clear that this Court has repeatedly told all states that the Commerce Clause is intended to prohibit the economic balkanization of the country that would result if states hoarded their natural resources. *E.g.*, *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

Petitioner Intake Water Company proposes a plan similar to that of *amicus curiae* YRP. Both projects would move Mohammed to the mountain: water from the river would be shipped to the coal fields. Both plans are reasonable from the point of view of the Compact because there exist substantial amounts of unused water

flowing down the Yellowstone River to the Missouri River, the Mississippi River and ultimately the Gulf of Mexico. Wyoming's unused share alone is about 2.2 million acre feet per year. Speech by George Christopolus, Wyoming State Engineer, to Wyoming Water Development Association, Casper, Wyoming, November 16, 1981.

In 1973, when the OPEC nations placed an embargo on shipments of crude oil to this country, the major energy companies came to Wyoming in droves. Their objective was to produce liquified hydrocarbons from the 20 billion tons of low sulphur coal located there. But coal production requires water, and thus the first major hurdle for new coal projects became access to adequate supplies of water. For this reason, the impact of Article X on access to Yellowstone River water has special importance.

Currently, Wyoming's coal deposits are not being vigorously developed, but four circumstances could trigger an urgent national need for greatly increased production from the Wyoming coal fields. First, for economic or political reasons OPEC could organize an oil embargo. The plummeting price of crude oil could drive the OPEC cartel back together, and OPEC could launch efforts to embargo crude oil shipments. In that case, the major energy companies would turn to alternate energy sources, one of the most abundant of which is Wyoming's vast coal deposits. The coal could be gasified, liquified, and used to generate electricity.

Second, the growing acid rain problem could precipitate greater reliance on cleaner sources of energy. In that event, Wyoming's low-sulphur coal could be substituted for the high-sulphur coal that the eastern states currently use to generate electricity.

Third, the nation must be prepared to cope with the eventual and inevitable exhaustion of the world's crude

oil supplies. When that happens, it will be essential to use Wyoming's coal deposits.

The fourth and, of course, final possibility would be the outbreak of a major war or other event that cuts off national access to crude oil shipments and threatens national security.

Without access to water for use in the energy conversion process, utilization of Wyoming's coal deposits will be seriously impaired in any of the circumstances described above.

The district court and the court of appeals erred when they failed to investigate whether Congress truly intended the Compact to permit the parochial interests of Montana, North Dakota, and Wyoming to supersede all federal interests. The resources at stake are important to the nation, and their availability to other states is an issue of prime importance to our federal system.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

WYOMING HERITAGE SOCIETY AND
YELLOWSTONE RIVER PIPELINE
COMPANY, INC., *Amici Curiae*

GEORGE A. ZUNKER *
JACK GAGE
WHITEHEAD, ZUNKER, GAGE,
DAVIDSON & SHOTWELL, P.C.
Suite 300
504 W. 17th Street
Cheyenne, WY 82001
Counsel for Amici Curiae

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-83-86-BLG

YELLOWSTONE RIVER PIPELINE COMPANY,
A WYOMING CORPORATION,
Plaintiff,

—VS—

MONTANA DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION; *et al.*,
Defendants.

[Filed Mar. 25, 1984]

OPINION AND ORDER

On March 16, 1984, a telephonic hearing was held on plaintiff Yellowstone River Pipeline Co.'s motion to lift the stay imposed by this Court and to set a date for hearing defendants' motion to dismiss. Proceedings in this Court were stayed in December 7, 1983, upon plaintiff's request, pending the final resolution of *Intake Water Company v. Yellowstone River Compact Commission*, Civil No. 1184.

The Court finds no compelling reason to lift the stay at this time. The decisions ultimately reached in *Intake Water Co.* are likely to be dispositive of the key issues in this matter. Those issues common to both cases have been exhaustively briefed by counsel before a three-judge panel

in the *Intake Water Co.* case. Relitigating those same issues at this time will not hasten the final resolution of plaintiff's case and will result only in a needless expenditure of the Court's resources. Therefore,

IT IS ORDERED that plaintiff's motion to lift the stay imposed by this Court on December 7, 1983, and to set a date for hearing defendants' motion to dismiss is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 16th day of March, 1984.

/s/ James F. Batten
Chief Judge